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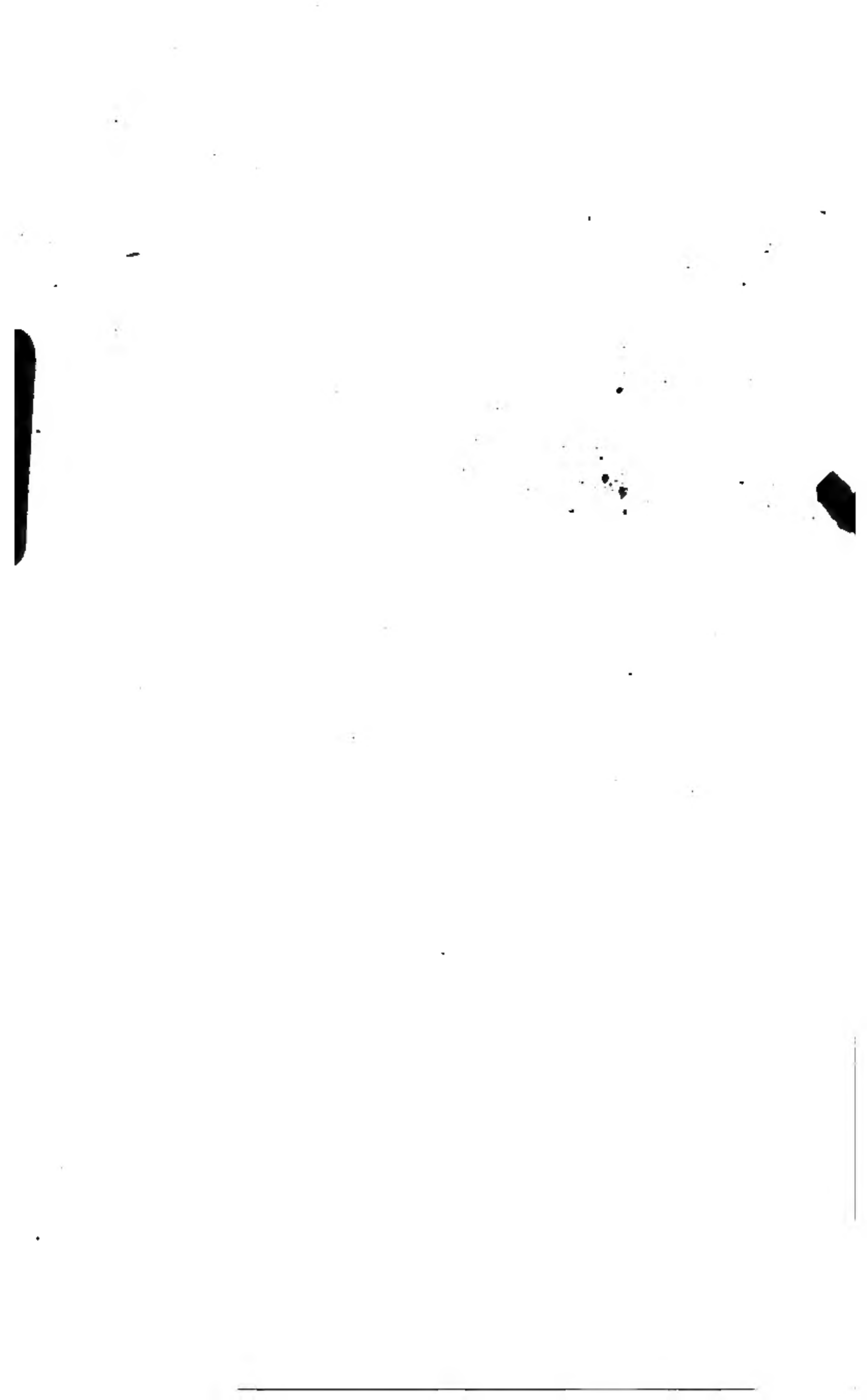
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Common Pleas

AND

Exchequer Chamber,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY

JOHN BAYLY MOORE, Esq., OF THE INNER TEMPLE,

AND

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BARRISTER AT LAW.

VOL. IV.

CONTAINING THE CASES FROM HILARY TERM, 10 & 11 GEO. IV. 1830,

TO

MICHAELMAS TERM, 1 WILL. IV. 1830, BOTH INCLUSIVE.

LONDON:

S. SWEET, CHANCERY LANE, FLEET STREET,

Late Bookseller & Publisher;

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J U D G E S

OF THE

COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL,
Knt., Lord Chief Justice.

The Hon. Sir JAMES ALLAN PARK, Knt.

The Hon. Sir STÉPHEN GASELEE, Knt.

The Hon. Sir JOHN BARNARD BOSANQUET, Knt.

The Hon. Sir EDWARD HALL ALDERSON, Knt.

ERRATUM.

Page 89, placitum, last line, *for* “indictment,” *read* “inducement.”

A

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CASES
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,

IN HILARY TERM,

IN THE TENTH AND ELEVENTH YEARS OF THE REIGN OF GEO. IV.

MEMORANDUM.

IN the course of the last vacation, the Honourable Mr. Justice *Burrough* resigned his office of one of the Justices of this Court. He was succeeded by Mr. Serjeant *Bosanquet*, who took his seat on the Bench on the 3rd of *February*. He afterwards received the honour of Knighthood.

1830.

FEARN v. LEWIS.

Saturday,
Jan. 23rd.

THIS was an action of *assumpsit* on a bill of exchange for 800*l.*, dated in *March*, 1819, brought by the plaintiff, of exchange, the defendant pleaded the statute of limitations; and two letters written by him to the plaintiff's agent were given in evidence, to take the case out of the statute. In the first letter, the defendant said, that he should be much obliged to the plaintiff to withdraw his outlawry; that, as soon as the defendant's situation would allow, the plaintiff's claim, with others, should receive that attention, that, as an honourable man, the defendant considered them to deserve; that it was his intention to pay them, but he must be allowed time to arrange his affairs; and if he were proceeded against, every exertion of his would be rendered abortive. In the second letter, the defendant said, that he was willing to do every thing to satisfy the plaintiff, and all his creditors; but that, if he was imprisoned, they would not get any thing:—*Held*, that these letters did not contain an absolute and unqualified acknowledgment, from which the Court could infer a promise to pay, but merely a conditional offer by the defendant, to give up his income to his creditors, provided he were allowed time to arrange his affairs; and the plaintiff, having offered no evidence of the outlawry, was nonsuited; as, without proof of the outlawry, there was no evidence to connect the acknowledgment in the letters with the plaintiff's claim:—*Held*, that such nonsuit was proper; and the Court refused to grant a new trial.

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FEARN
v.
LEWIS.

as drawer, against the defendant, as acceptor. Pleas, the general issue, and the statute of limitations.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the sittings after the last term, in order to take the case out of the operation of the statute, the plaintiff produced two letters, written by the defendant to his (the plaintiff's) agent. The first was dated on the 22nd of *April*, 1828, and was as follows:—

“ My dear Sir,—I am this day favoured with your's, and feel obliged by the offer of assistance to settle with Mr. *Fearn*; and, in the present stage of my affairs, I can only say, I shall feel much indebted to Mr. *Fearn* to *withdraw his outlawry*; and as soon as common decency and my situation will allow, Mr. *Fearn's* claim, with others, shall receive that attention, that, as an honourable man, I consider them to deserve; and it has been and is my intention to pay them. I cannot conclude without saying, I must be allowed time to arrange my affairs. If I am proceeded against, every exertion of mine will be rendered abortive, and the *Bench*, or *France*, must be my destination; and any one who reads my father's will, will soon see how I am situated. Your's, &c.

W. Lewis.”

The second letter was dated on the 12th of *July*, 1828, and was in the following terms:—

“ Dear *Manning*,—I beg leave to apologize for any neglect in regard to answering your kind letter, and, I assure you, Mr. *Matthews* was desired to call on you when in town, and to arrange with Mr. *Fearn*; however, as it now appears he has not done so, allow me to say, I am ready and willing to do any thing and every thing to satisfy Mr. *Fearn* and all my creditors; and my only regret is, that, by the way my father has left me, I am totally unable to do more than give up, which I do by deed, al-

most the whole of my income to my creditors, and no man can do more; and if I am put into prison, not one penny will my creditors ever receive. For the truth of this, I refer you now to my father's will, and declare to you I am not worth one pound; this place is mine to live in, but every thing is left as heir-looms, and cannot be touched by any process; and if my person is laid hold of, I never mean to put in bail, but surrender. Let me hear from you; and I am your's, &c.

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W. Lewis."

The Lord Chief Justice was of opinion, that, as the first letter referred to a particular claim by the plaintiff on the defendant, in respect of which the latter had been outlawed, it was incumbent on the former to shew the fact of the outlawry, particularly, as it did not appear upon the face of the record: and that it was also necessary for the plaintiff to shew that the acknowledgment contained in the defendant's letters applied to the claim on the bill upon which this action was brought. His Lordship therefore directed a nonsuit to be entered, reserving leave to the plaintiff to move to set it aside, and that a verdict might be entered for him, in case the Court should be of opinion that he was entitled to recover (a).

Mr. Serjeant *Taddy* now applied for a rule *nisi* accordingly. As the defendant, in his letters, acknowledged that something was due to the plaintiff, and that his claim should receive attention, it was for the defendant to shew that there were other claims to which the acknowledgment might apply. Although no particular debt is referred to, the word *claim* is referrible to any demand the plaintiff might think fit to set up; and, in the second letter, he is described as being a creditor of the defendant, who was

(a) See 3 Carr. & Payne's Ni. Pri. Cases, 173.

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ready to give up nearly the whole of his income. The plaintiff, therefore, was not bound to prove a negative, or shew that there were no other claims to which the defendant's admission might apply; and whether a sufficient acknowledgment appeared on the face of the letters, to connect it with the bill in question, was matter of consideration for the Jury, and should have been left to them accordingly. In *Frost v. Bengough*(a), to an action on a promissory note, the defendant pleaded the statute of limitations, and the plaintiff gave in evidence a letter written by the defendant, stating, that business called him to *Liverpool*; but, should he be fortunate in his adventures, the plaintiff might depend on seeing him at *Bristol*, (the place of the plaintiff's residence), otherwise, that he must arrange matters with him as circumstances would permit; and it was not shewn that the letter referred to any other transaction between the parties than the note in question; it was held, that it was properly left to the Jury to determine whether the letter related to the note, so as to amount to a sufficient acknowledgment, to take the case out of the statute: and Mr. Justice *Park* there said (b),—"It is perfectly clear, that, in general, the plaintiff is bound to make out a *prima facie* case, and adduce evidence of an acknowledgment by the defendant, to take a case out of the statute. Here, he produced a promissory note, which was proved to be in the hand-writing of the defendant, as well as a letter written by him, which, although couched in ambiguous terms, was sufficient to shift the *onus* on the defendant, and make it incumbent on him to shew that it related to other matters than the note in question; particularly, when it is considered, that the defendant, by pleading the statute, has virtually admitted that a debt was originally due:"—and Mr. Justice *Burrough* said (c), "Whenever the statute of limitations is pleaded as a defence to the action, the party

(a) 8 B. Moore, 180; S. C. 1
Bing. 266.

(b) 8 B. Moore, 185.

(c) 8 B. Moore, 187.

pleading it virtually admits that a debt was originally due; and here, the defendant's letter can relate to nothing, unless it be taken to refer to a pre-existing demand." That is precisely in point; and the same doctrine was laid down by Lord *Kenyon*, in *Baillie v. Lord Inchiquin* (a), where his Lordship ruled, that where a debt is established against a defendant who relied on the statute of limitations, if the plaintiff give any general evidence of acknowledgment, it must be taken to apply to the debt in question, and that it lies on the defendant to explain the promise so made, and shew that it applied to some other demand. So here, the plaintiff was only bound to shew that he had a claim or demand on the defendant; which he did by proving the acceptance of the bill by the latter; and it was incumbent on him to shew that the plaintiff's claim did not refer to that bill.

[Mr. Justice *Gaselee*.—It has been lately decided, both in this Court and in the *King's Bench*, that, in order to take a case out of the operation of the statute, there must be proof of a promise by the defendant to pay, as well as an acknowledgment of the debt; and here the letters do not contain an express or absolute promise to pay, for the defendant only stated, that the plaintiff's claims should receive attention as soon as the situation in which the defendant was placed would allow; and he only offered to compromise with his creditors as far as the estate left him by his father would enable him to do. That, therefore, not only negatives a promise of immediate payment, but, so far from it, shews that the defendant was not then in a situation to pay.]

In *Tanner v. Smart*, Lord *Tenterden* drew the true distinction, and said (b), "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies

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(a) 1 Esp. Rep. 436.

(b) 6 Barn. & Cress. 609.

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it with an express declaration to prevent any such implication, why shall not the rule *expressum facit cessare tacitum* apply?" And, in the late case of *A'Court v. Cross* (a), where the defendant distinctly and expressly declared that he would not pay, it was held, that a promise could not be raised by implication that he would. In *Scales v. Jacob* (b), and *Ayton v. Bowles* (c), the promises by the defendants were merely conditional, *vis.* to pay when of ability. Here, however, there is no qualified promise or acknowledgment; and both letters must be taken together, by which the defendant acknowledged that the plaintiff had a claim on him, and that he was willing to do every thing to satisfy him and all his (the defendant's) creditors.

With respect to the objection as to the outlawry, it is only necessary to state it on the record, where one of several defendants has been outlawed; neither was it necessary for the plaintiff to produce the proceedings, or put in the record of outlawry; and although there might have been a previous intention on his part to outlaw the defendant, it might have been afterwards abandoned; and it does not appear that he was outlawed in this suit.

Lord Chief Justice TINDAL.—Upon again looking at the defendant's letters, which were produced by the plaintiff, as evidence of an acknowledgment of the existence of the debt for which this action is brought, and a promise by the defendant to pay it, I still retain the same opinion I expressed at the trial. It was not for the Jury to decide upon the legal effect to be given to the letters, or whether they amounted to a sufficient acknowledgment of a debt, from which a promise to pay might be inferred, so as to take the case out of the operation of the statute. From several recent cases, it is now necessary for the plaintiff to

(a) 11 B. Moore, 198; S. C. 3 Bing. 638.

Bing. 329.

(c) 12 B. Moore, 305; S. C.

(b) 11 B. Moore, 553; S. C. 3 4 Bing. 105.

prove either an actual promise or an absolute and unqualified acknowledgment, from which a promise to pay the debt, as stated in the declaration, may be inferred; and since the statute 9 Geo. 4, c. 14, such acknowledgment or promise must be in writing. The question, then, is, whether these letters contain a distinct and unqualified acknowledgment of an existing debt due to a creditor, which, in legal operation, takes the case out of the provisions of the statute. The letters are not addressed to the plaintiff, but to a third party; however, it is not now necessary to consider that point. The first letter points to a particular claim or debt, upon which the defendant had been outlawed by the plaintiff; and although it is true that the fact of the outlawry need not have been stated on the record, still, as it referred expressly to the plaintiff's claim, I thought, that, unless he produced the proceedings in the outlawry, the acknowledgment in the letters might or might not apply to such claim; and, on that ground, I directed a nonsuit. But an additional objection to the plaintiff's right to recover has been raised by my brother *Gaselee*, in the course of the argument; and the Court will not send the case down to another trial, if it appear that the plaintiff cannot recover, in point of law, although he was nonsuited on another ground. Now, I am of opinion, that neither of the letters import such a direct or unqualified acknowledgment of a debt, as would authorize the Court to infer a promise to pay. The promise is a mere conditional promise; for, in the first letter, the defendant merely says, that as soon as his situation will allow, the plaintiff's claim, with others, shall receive that attention, which, as an honourable man, the defendant considered them to deserve; that he must be allowed time to arrange his affairs; and that, if he were proceeded against, every exertion of his would be rendered abortive; and he refers to his father's will, to shew how he was then situated; and, in the second letter, he regrets, that, by the way in

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which his father had left him, he was unable to do more than give up nearly the whole of his income to his creditors; and he further said, they would never receive one penny if he was put into prison. Both letters, therefore, only import an offer on the part of the defendant to give up his income to his creditors, provided he were allowed time to arrange his affairs.

Mr. Justice PARK.—I am of the same opinion, and think the nonsuit was right. Besides, this case appears to me to fall within the principle established in *Tanner v. Smart*. The defendant's letters do not, upon the face of them, purport to apply to the plaintiff's claim or demand on the bill upon which the action is brought; at most, they only contain a conditional promise to pay, and, by the late statute, an acknowledgment or promise must be express and direct in itself, in order to be received as evidence of a new or continuing contract, to take a case out of the operation of the statute.

Mr. Justice GASELEE.—Admitting the rule to be, that a promise to pay may be implied from a general and unqualified acknowledgment of a debt, yet the question here is, whether the defendant's letters contain a direct acknowledgment or promise to pay a pre-existing debt or claim made by the plaintiff, as a creditor. The maxim, *expressum facit cessare tacitum*, appears to me to apply. Both the letters are written in guarded terms; for the defendant expressly says, that if his creditors proceed against him, he must go to prison; and that, if he were put there, they would never receive one penny; and that he was unable, from what his father had left him, to do more than give up nearly the whole of his income to his creditors. This was not an unqualified acknowledgment of a promise to pay a pre-existing debt. I concur with my Lord Chief Justice, that although the plaintiff was nonsuited on another ground, it

would be idle to grant a new trial, if we see, from the letters containing the acknowledgment, that he would not be entitled to recover at law.

Rule refused.

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HACK, Plaintiff; M'GREGOR and others, Deforciant.

Saturday,
Jan. 23rd.

BY a rule of this Court (a) it was ordered, that no fine should be suffered to pass, unless the caption of such fine be before one of the Justices or Barons of his Majesty's Courts of record in *Westminster Hall*, or one of the Serjeants-at-law; unless an affidavit be made and filed, stating, that the Commissioners taking the same are, to the best of the deponent's information and belief, either barristers of five years' standing, or solicitors or attornies of some of the Courts in *Westminster Hall*, the Judges of the Courts of *Session* and *Exchequer*, or advocates and clerks to the Signet of five years' standing, in *Scotland*.

By rule of Court, *Mich.* 39 Geo. 3, all captions of fines in *Scotland* must be taken before advocates and clerks to the signet. But where the property was of small value, and the deforciant, ten in number, lived a great distance from *Edinburgh*, and the *dedimus* was directed to four Commissioners, one of whom was a magistrate and a notary public, the Court permitted the fine to pass.

Mr. Serjeant *Bompas* moved, that this fine might pass, on an affidavit, which stated, that the deforciant, ten in number, lived at *Inverness*, which was one hundred and fifty miles distant from *Edinburgh*, where all advocates and clerks to the signet resided, and that the property intended to pass was only of the value of 56*l*.

The *dedimus* was directed to four Commissioners; and it being sworn that the acknowledgments were taken before three of them, two of whom were agents or attornies in the Sheriff's Court, and the third a Magistrate and notary public, the Court thought, that, under these circumstances, the fine might pass.

Fiat (b).

(a) M. T. 39 Geo. 3, 1 Bos. & Pul. 362.

(b) See *Seton*, plaintiff; *Sinclair* and others, deforciant, 2 Sir W. Bl. 880.

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Monday,
Jan. 25th.

WALMESLEY v. DIBDIN.

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in a certain sum, upon *the balance* of a bill of exchange drawn by the plaintiff upon, and accepted by the defendant, and due at a day past, is sufficient.

In an affidavit of debt, the defendant was described as *Thomas Froggatt Dibdin*; his real name was *Thomas Frognall Dibdin*. In the declaration, the defendant was described as *Thomas Frognall Dibdin*, sued by the name of *Thomas Froggatt Dibdin*; and he signed the bail bond in his proper name:—*Held* to be a waiver of the misnomer in the affidavit.

THE defendant was arrested and held to bail, on the following affidavit of debt:—

“ *C. M.*, of &c., maketh oath and saith, that *Thomas Froggatt Dibdin*, (the defendant), is justly and truly indebted to *Richard Walmesley*, (the plaintiff), in the sum of 36*l.* and upwards, upon *the balance* of a bill of exchange drawn by the said *Richard Walmesley* upon, and accepted by the said *Thomas Froggatt Dibdin*, and due at a day now past, and which still remained unpaid.”

Mr. Serjeant *Merewether* moved that the bail bond given by the defendant might be delivered up to be cancelled, upon his entering a common appearance. The motion was founded on an affidavit, which stated that the defendant's real name was *Thomas Frognall*, and not *Thomas Froggatt*, and that he was always known by the former name only. The learned Serjeant also submitted, that, as the affidavit only stated that the sum due to the plaintiff was upon *the balance* of a bill of exchange, without stating the amount of the bill, it was not sufficiently certain.

But it appearing that a declaration had been delivered conditionally, in which the defendant was described as *Thomas Frognall Dibdin*, sued by the name of *Thomas Froggatt Dibdin*, and that he had signed the bail bond in his right name—the Court held it to be a waiver of the objection as to the misnomer in the affidavit, which was sufficiently explicit and certain, as it stated the defendant to be indebted to the plaintiff in a certain sum, upon the balance of a bill of exchange drawn by the plaintiff upon, and accepted by the defendant, and which was overdue and unpaid.

Rule refused.

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Tuesday,
Jan. 26th.

DOE on the Demise of WALKER v. ROE.

MR. Serjeant *Wilde* moved, that service of a copy of the declaration on the tenant, and notice to appear in this cause, might be deemed good service. He produced an affidavit, which stated that the deponent served the copy and notice on a woman upon the premises, who represented herself to be the wife of the tenant in possession.

Service of a copy of a declaration and notice in ejectment on a woman upon the premises, who represented herself to be the wife of the tenant in possession:—*Held* sufficient.

Mr. Justice GASELEE, (the only judge in Court), held it to be a sufficient service (a).

(a) See Tidd's Practice, 9th edit. Vol. 2, p. 1210.

FRENCH v. BROOKE and Another.

Wednesday,
Jan. 27th.

THIS was an action of special *assumpsit* for the breach of an agreement, under which the defendants, as directors of a mining company, called the *Famatina Mining Company*, appointed the plaintiff their agent, to superintend the Company's mines in *South America*.

The agreement was as follows:—

“ Articles of agreement entered into, this 27th August, 1825, between *John Oliver French*, Esq., (the plaintiff), of the one part; and *Henry James Brooke*, Esq., and

The defendants, directors of a mining Company in *South America*, agreed to employ the plaintiff as superintendant of the mines, for three years, at a salary increasing yearly; and the directors were at liberty to dissolve the agreement at any time, on giving the plaintiff twelve

months' notice, or paying him twelve months' salary in lieu of such notice, and a reasonable sum towards defraying his expenses to *England*; and if the plaintiff served the three years, he should be entitled to the expenses attending the return of himself and his family. The directors dismissed him before the expiration of the second year, without giving him the notice, or paying him the year's salary:—*Held*, that he was only entitled to a year's salary from the date of his dismissal, and to his own expenses for his return to *England*; and the Jury having found for those sums only, the Court refused to increase the verdict, by adding expenses incurred by the plaintiff for the return of his family, or for the salary which would have accrued from the time of his dismissal to the end of the third year, when his service would have ended.

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Lieutenant Colonel *Rowan*, (the defendants), for and on behalf of the *Famatina Mining Company*, on the other part.

“ *First.*—The said *John Oliver French* shall forthwith proceed to *Buenos Ayres*, and from thence to the mines, and employ himself for the space of three years, to be computed from the date of his arrival at the mines, (but determinable, nevertheless, as hereinafter mentioned), in the service of the said Company, in the capacity of commissioner, or superintendant.

“ *Secondly.*—The said *John Oliver French* shall, while in *South America*, reside in such places, and remove, from time to time, to such parts as shall appear to be most conducive to the interests of the said Company; he shall devote the whole of his time and attention to the service of the Company, and shall not, during his continuance in their service, directly or indirectly be engaged in any other transaction, speculation, or undertaking whatsoever.

“ *Thirdly.*—The said directors shall pay, or cause to be paid, unto the said *J. O. French*, as a remuneration for his services, the following salary; that is to say, at the rate of 600*l.* sterling, from the day of his embarkation, for the first year of his service, with an increase of 50*l.* for each succeeding year of his service.

“ *Fourthly.*—The directors shall provide a passage for the said *J. O. French*, in such ship as they may think fit, to *South America*, and shall defray the expense of such passage, and of the journey of the said *J. O. French* from thence to the mines; and the said *J. O. French* shall also be allowed, in addition to his salary, the costs and expenses of journies made by him on account of the Company.

“ *Fifthly.*—The directors shall be at liberty to dissolve this agreement at any time, on giving to the said *J. O. French* twelve calendar months’ notice in writing, or

paying him twelve months' salary, in lieu of such notice, and on paying to him a reasonable sum towards defraying *his* expenses from *South America* to *England*; the expenses of his journey from the mines to the port of embarkation to be also paid by the Company.

“*Sixthly.*—If the said *J. O. French* shall faithfully serve the said Company for the space of three years from his arrival at the mines, and shall not, at the expiration of such time, continue to serve the said Company under any fresh contract, he shall, in like manner, be entitled to a reasonable sum towards defraying the expenses of his return to *England*; the expenses of the journey from the mines to the port of embarkation to be paid by the Company, and also all reasonable expenses for the return of his family to *England*.”

Then followed other clauses, by which it was stipulated, that, in the event of the plaintiff becoming at any time incapable of performing his duty, from ill health, or accident, or from any other cause, and if his term of service should thenceforth cease, he should be entitled to receive, on such termination of his service, six months' salary, to be calculated at the rate of salary payable when the plaintiff should become so incapable: that the agreement should have the same force and effect in *South America*, as if it had been made and concluded in that country; and, *lastly*, the plaintiff, for himself, his heirs, &c., covenanted with the defendants, or the survivor of them, in trust for the members for the time being of the Company, that he, the plaintiff, would, during the said term, well and truly observe, perform, fulfil, and keep all the stipulations contained in the agreement on his part to be observed, &c., to the best of his skill and ability, under the penalty of 300*l.* sterling; which should be deemed and considered as liquidated damages, and recoverable accordingly.

This agreement was signed and sealed by the plaintiff and the defendants; and in pursuance thereof, the plaintiff sailed from this country on the 29th *August*, 1825, and arrived

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at the Company's mines on the 14th *April*, 1826, and continued to superintend the works until the 8th *October*, 1827, when he received the following letter, signed by four honorary directors, who were authorized to act for the Company at *Buenos Ayres*:—

“ *Buenos Ayres, Sept. 10th, 1827.*

“ *Senhor Don Juan O. French.*

“ The directors of the *Famatina* Company, who subscribe in the necessity under which they find themselves of reducing the expense of the enterprise with which they are charged, from the impossibility of sustaining them, in which they have been placed by the non-remission of funds on the part of the directors in *England*, have agreed, at a meeting of the 5th instant, to suppress the place of intendant, hitherto filled by you. In consequence, immediately upon the receipt of this resolution, you will remain separated from the service of the Company, and will proceed to deliver over to *Senhor Don Pantaleon Garcia*, all the utensils, accounts, and other appurtenances in your charge; to which effect, the directors transmit a complete order of this date, to the above mentioned *Senhor Garcia*.”

To this letter the plaintiff returned the following answer:—

“ *To the Directors of the Famatina Mining Company, at Buenos Ayres.*

“ *La Rioja, October 11, 1827.*

“ *Gentlemen*,—I have received your communication, in which you announce, that you have suppressed the place of intendant, and that I am to remain separated from the service of the Company immediately that I receive the above-mentioned communication. I protest against the legality of this proceeding, which could not be legally verified, even were it sanctioned, by the *English* directors

in the terms which you have thought fit to employ for effecting such dismissal, seeing that the directors by contract, solemnized and admitted, (and even by your own admission, in a similar case, in your last official letter, which I have in my possession, treating of the discharge of certain of the *English* miners), were obliged to pay over a year's salary, in hard dollars, reckoning from the day of dismissal, and provide me with the sum necessary for the reasonable expenses of the voyage of my family to *England*, or otherwise give me a year's notice of dismissal, paying the cost of such voyage. I am certain that my relations with the *London* directors are such, as not to warrant the arbitrary, sudden dismissal you have resolved on; but in any case, I shall not fail to do the utmost in my power, in order to avoid injustice, and to realise the necessary funds, and apply them for carrying to *Buenos Ayres* those of the Company's servants, whom you, by your present proceedings, have left in my hands, destitute of help and means, even for this purpose. The foregoing is the reply of the undersigned, to your communication of the 10th *ultimo*.

J. O. French."

Shortly after the plaintiff's return to this country, he delivered in an account to the defendants, as directors, charging the Company with the sum of 1815*l.*, as a balance due from them to him; and the account contained the following, among other *items, viz.* 700*l.* for a year's salary from the date of his (the plaintiff's) dismissal, he having been dismissed without having received twelve months' previous notice; 470*l.* for salary from the 28th *August*, 1828, to the 14th *April*, 1829, the expiration of the third year from the day of his arrival at the mines, at the rate of 750*l. per annum*; and 320*l.* for the expenses of the plaintiff's journey from the mines to *Buenos Ayres*, and of the passage of himself, his wife, and family, from

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thence to *England*. The defendants having refused to pay either of those sums, the present action was commenced; but there was no allegation of the plaintiff having sustained special damage in either of the counts of the declaration, he merely having averred, that he had suffered great inconvenience by non-payment of the above sums.

At the trial, before Mr. Justice *Gaselee*, at *Guildhall*, at the sittings after the last Term, it was insisted, that the plaintiff was entitled to recover the amount of the above sums, for the breach of the agreement by the defendants, as he had been dismissed at a moment's notice, and without any imputation of misconduct on his part. The learned Judge, however, thought, that, under the circumstances, the plaintiff was not entitled to claim the two latter sums of 470*l.* and 320*l.*; but he requested the Jury to say whether they considered 320*l.* a reasonable sum for the expenses incurred in the journey and passage from the mines to this country. They found, that it was, and gave a verdict for the plaintiff, for 1025*l.*, leave being reserved to him to move to increase the damages to 1815*l.*, being the full amount of his claim, in case the Court should be of opinion that he was entitled to recover the two latter sums.

Mr. Serjeant *Wilde* now moved accordingly. With respect to the expenses incurred by the plaintiff on his return to this country, it is quite clear, that, if he had been allowed to continue his services for the three years, according to the terms of the agreement, he would be entitled to receive all reasonable expenses *for the journey of himself and his family*; and as the contract was never legally determined, because, instead of having twelve months' notice of the dissolution of the contract, the plaintiff was dismissed at a moment's notice; the agreement must be taken to continue and be in force to the end of the three years, on the terms therein specified. The

discharge or dismissal of the plaintiff by the directors at *Buenos Ayres*, could not operate as a determination of the contract, any more than a notice to a tenant to quit premises immediately, where he was by law entitled to six months' previous notice. The plaintiff is therefore entitled to recover his salary to the end of the third year, at the rate specified in the agreement. By the fifth clause, the directors were bound by a condition precedent to the plaintiff's dismissal, either to give him twelve months' notice, or to pay him a year's salary in lieu of such notice; and they could not determine the contract without it. But, as they did neither, they are liable to the full extent of the agreement, which entitles the plaintiff to recover the whole of his demand.

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Mr. Serjeant *Taddy*, on the part of the defendants, applied for a rule *nisi*, that the verdict found for the plaintiff might be set aside, and a new trial granted; or, that the damages might be reduced to 461*l.* 18*s.* 4*d.*, on the ground, that the Jury had not given the defendants credit for 2500 dollars, which the plaintiff by letter had acknowledged he had received in *South America*, on account of his salary as superintendant of the mines.

Lord Chief Justice TINDAL.—I am of opinion, that, in this case, the Jury have done justice, and that their verdict ought not to be disturbed. The motion to increase the damages is founded on the construction of the agreement; and it has been insisted for the plaintiff, that, as the contract between him and the defendants was not determined in the mode pointed out by the express terms of the agreement, it must be considered as subsisting for the whole period of three years from the time of the plaintiff's arrival at the mines, that being the time originally contemplated between the parties. But in this action, like others of the same nature, the plaintiff has sought to recover damages for a breach of contract; and he has no cause to com-

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plain, if the Jury have given him damages equivalent to the injury he has actually sustained. The words of the fifth clause are, that "the directors shall be at liberty to dissolve the agreement at any time, on giving to the plaintiff twelve calendar months' notice in writing, or paying to him twelve months' salary in lieu of such notice, and on paying to him a reasonable sum towards defraying *his expenses from South America to England.*" It appears to me, that, by the verdict, the plaintiff has recovered all he can be entitled to receive from the defendants; because, if the directors had paid him a year's salary at the time of his dismissal, and a reasonable sum towards defraying his expenses from *South America to England*, he could have no further claim on the Company. No special damage was alleged in the declaration, nor did the plaintiff attempt to prove any; and although he had not the twelve months' notice of dismissal, yet, if the directors at *Buenos Ayres* had inclosed 750*l.* in their letter, and also a sufficient sum to defray the plaintiff's expenses for returning to this country, it would have been sufficient, and he would have had no cause to complain. It was at the option of the directors to dissolve the agreement at any time, on payment of these sums; and the Jury have, in effect, given damages sufficient to cover both these sums. But it has been said, that the contract was not legally determined, as the clause providing for the payment of the expenses attending the return of the plaintiff's family to this country is still in operation. But that clause applies only to the case of three years' service, actually and fully performed. If, indeed, the plaintiff had alleged and proved that a specific or proximate damage had accrued to him, either from the non-payment of the year's salary by the directors at the time of his dismissal, or that he had thereby been unable to procure a passage home, or that he had been delayed in *South America*, the Jury might have taken these circumstances into their consideration. But the plaintiff merely alleged in his declaration, that he

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had received an injury from the non-payment of those sums which he claimed to recover for the breach of the agreement. This, therefore, seems to me to fall within the ordinary case of an action for a breach of an agreement, in which the Jury have given damages commensurate with such breach. With respect to the application by the defendants to reduce the damages, on the ground that the plaintiff had, by letter, acknowledged that he had received 2500 dollars in *South America*, on account of his salary, yet it appears, that there was an account current between him and the defendants during the whole of his stay there. The defendants did not object to the plaintiff's final account, when tendered to them, and they did not produce it at the trial. The plaintiff might have debited himself with the sum which it was alleged he had admitted he had received on account of his salary; and I am therefore of opinion, that the verdict ought not to be disturbed.

Mr. Justice GASELEE (a).—When this case came before me at *Nisi Prius*, I thought, from the complicated state of accounts between the parties, that the Jury could not possibly come to a right determination, or form a correct opinion as to the true nature of the accounts. I therefore was most anxious to refer them to a gentleman at the bar; and it would have been far more satisfactory to me, if that course had been adopted. I however thought that two points ought to be considered by the Court: first, whether the plaintiff was entitled to the expenses of bringing home his wife and family, and, secondly, whether he could recover his salary from *August*, 1828, to *April*, 1829, when the three years' service would have been completed. I certainly thought he could not, and still entertain the same opinion. No complaint has been made as to the manner in which the case was left to the Jury, nor

(a) Mr. Justice Park was absent.

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did the defendants find any fault with the account delivered by the plaintiff, or object to the amount he sought to recover; and although it is now said, that the plaintiff by letter acknowledged, that he had received a certain sum on account of his salary, the defendants should have shewn it at the trial; and as they did not, I think, that, under all the circumstances, there is no ground for increasing or reducing the damages. It was the duty of the defendants to have produced all the accounts between them and the plaintiff; and there is no ground for saying, that justice has not been done between the parties.

Both rules refused.

Thursday,
Jan. 28th.

DOE on the Demise of CAMPBELL v. SCOTT.

A notice to a weekly tenant, whose tenancy commenced on a *Wednesday*, to quit on *Friday*, provided his tenancy commenced on a *Friday*, or, otherwise, at the end of his tenancy, next after one week from the date of the notice:—*Held* sufficient.

THIS was an action of ejectment, and brought to recover the possession of two tenements, which had been demised by the Dean and Chapter of *Westminster* to one *Hill*, for the term of forty years, which expired at *Midsummer-day*, 1829, when another lease was granted to the lessor of the plaintiff. The defendant *Scott* held under *Hill*, as a weekly tenant, and agreed to continue tenant to the plaintiff on the same terms. *Midsummer-day* fell on a *Wednesday*, when the defendant's tenancy commenced. At *Michaelmas* last, the plaintiff served the defendant with the following notice to quit:—

“I hereby give you notice to quit and deliver up, on *Friday*, the 2d of *October* next, possession of the tenements you now hold of me, provided your tenancy commenced on a *Friday*, or, otherwise, at the end of your tenancy next after one week from the date hereof.”

The action was commenced in the last term; and at the trial, before Lord Chief Justice *Tindal*, at *Westminster*,

at the adjourned Sittings after the Term, the Jury found a verdict for the plaintiff.

Mr. Serjeant *Lawes* now applied for a rule *nisi*, that the verdict might be set aside, and a nonsuit entered, on the ground of the insufficiency of the notice to quit. He submitted, that some precise time for quitting should have been specified, or that, at all events, the defendant should have been required to quit at the end of the *current week* from the date of the notice; and that the words, 'at the end of your tenancy,' conveyed no precise or definite meaning. He referred to the case of *Doe d. Phillips v. Butler*(a), where, in the case of a yearly tenancy, a notice to quit 'at the expiration of the *current* year of the tenancy, which should expire next after the end of one half year from the date hereof,' was held to be sufficient.

The Court, however, being of opinion that the notice was sufficient, the learned Serjeant took nothing by his motion.

(a) 2 Esp. Rep. 589.

SHAW v. The Marquis of WORCESTER.

THE plaintiff signed judgment in this cause, and sued out a writ of *non omittas fieri facias* thereon, for the arrears of an annuity secured by a warrant of attorney; which, after reciting the grant of an annuity of 25*l.* 12*s.*, by the defendant to the plaintiff, the covenant by the defendant for the due payment of the annuity, and that judgment should be entered up, under the warrant of attorney, as a security for such payment;—the defendant authorized and empowered the plaintiff's attornies, or any other attorney of this Court, to appear in the said Court, for him, the defendant, in or as of *Trinity* Term, 1828, or any other subsequent Term, and then and there to receive a declaration for him in an action of *debt upon a*

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The statute 8 & 9 Wm. 3, c. 11, does not apply to a warrant of attorney given as a security for the payment of an annuity; and therefore, the grantee may sign judgment and sue out execution for the arrears of the annuity, without previously assigning breaches under the 8th section of that statute.

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mutuatus against him, for the sum of 3,400*l.*, at the suit of the plaintiff, his executors, or administrators; and thereupon to confess the said action, or else to suffer a judgment, by *nil dicit* or otherwise, to pass against the defendant in the said action, and to be forthwith entered up against him of record in the same Court, for the said sum of 3,400*l.*, together with costs of suit. And the defendant did thereby further authorise and empower the said attornies, after the said judgment should have been so entered up as aforesaid, in the name of him, the defendant, and, as his act and deed, to execute one or more effectual release or releases in the law, to the plaintiff, his heirs, executors, &c., of all errors, writs of error, and of all benefit and advantage thereof, and of all defects and imperfections whatsoever, to be committed, occasioned, or suffered, in, about, or concerning the said judgment, or in, about, or concerning any writ, warrant, process, declaration, plea, entry, or other proceeding whatsoever, in anywise concerning the said judgment; and for whatsoever the said attornies should do, or cause to be done, in the premises, that should be to them a sufficient warrant and authority. And the defendant did thereby agree, that when and as often as any default should be made in payment of the said annuity, or yearly sum of 251*l.* 12*s.*, and the whole or any part of any quarterly payment of the same should be in arrear and unpaid, by the space of twenty-one days, it should and might be lawful to and for the plaintiff, his executors, &c., to sue out execution or executions upon the said judgment against the defendant, his heirs, executors, &c., for so much and such part of the said annuity, or yearly sum of 251*l.* 12*s.*, as should be then due, together with costs, Sheriff's poundage, &c.; and that without making or entering any previous suggestion, or suing out or executing any writ of scire facias or inquiry, under the statute 8 & 9 *Wm.* 3, or any other suggestion, writ of scire facias, or inquiry whatsoever; and that no writ of error should be brought, or bill in

equity filed, or any advantage taken, or attempted to be taken, by the defendant, his heirs, &c., for or on account of the premises, or any other matter, cause, or thing whatsoever, touching or concerning the issuing or executing of any such execution as aforesaid, or any other proceedings which might be had or taken on the said judgment, or to enforce the execution thereof, according to the true intent and meaning of the warrant of attorney.

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Mr. Serjeant *Wilde*, in the last term, obtained a rule calling on the plaintiff to shew cause why the writ of *non omittas fi. fa.* which had been sued out and executed in this cause, should not be set aside for irregularity; on the ground, that the plaintiff ought to have suggested breaches of the covenant for payment of the annuity, on the roll, pursuant to the statute 8 & 9 *Wm.* 3, c. 11, s. 8 (a).

Mr. Serjeant *Merewether*, and Mr. Serjeant *E. Lawes*, on a former day in this Term, shewed cause.—A warrant of attorney to secure the payment of an annuity, and authorizing judgment to be entered up by *nil dicit* in an action of debt upon a *mutuatus*, does not fall within the terms or meaning of the statute, the object of which was to protect defendants against the payment of more money than is justly due to the parties suing, and to take away the necessity of proceedings in equity, to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only have accrued: and although, when covenants and agreements are contained in the conditions of bonds or other instruments of a like nature, they are within the statute; yet, where judgment is entered up on a warrant of attorney, it is not so, for, in *Austerbury v. Morgan* (b), it was expressly decided, that no suggestion was necessary, although the defendant gave the

(a) See this section, *post*, page 26.

(b) 2 Taunt. 195.

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plaintiff a bond in a penal sum conditioned for the payment of an annuity, and also a warrant of attorney as a collateral security. So, in *Cox v. Rodbard* (a), it was held, that a suggestion is not necessary upon a warrant of attorney to confess a judgment in a penal sum, and conditioned for the payment of a less sum by instalments. The case of *Howell v. Stratton* (b) is expressly in point, where a party gave a warrant of attorney by way of collateral security for the payment of an annuity, and it was agreed, that, in default of any one payment of the annuity, judgment should be entered up, and execution issue for the whole sum specifically, being the price of the annuity; on its being suggested by counsel to the Court that it was not a judgment within the statute, but upon a *mutuatus*, they were of opinion that it was unnecessary to assign breaches. In *Morris v. Jones* (c), where a warrant of attorney contained a stipulation that execution might issue upon the judgment, after a year and a day, without reviver by *scire facias*, it was held that the parties might lawfully make such a bargain, and that the execution was good. And here, the parties have expressly stipulated that when default should be made in payment of the annuity, the plaintiff might sue out execution upon the judgment against the defendant for such arrears, without making or entering any previous suggestion under the statute 8 & 9 *Wm.* 3, or any other suggestion whatsoever; and by which the defendant must be bound.

Mr. Serjeant *Wilde*, in support of his rule.—The plaintiff was bound to assign breaches before he sued out execution against the defendant. The statute of *William* is a remedial statute, and has always received a very liberal construction, and its main object was to protect parties against the effect of their own improvident agreements,

(a) 3 Taunt. 74.

(b) 2 Smith's Rep. 65.

(c) 2 Barn. & Cress. 242.

and to apply to every species of contract secured by a penalty. In *Hurst v. Jennings* (a), where a bond upon the face of it appeared to be conditioned for the payment of a sum certain; but, by an indenture of the same date, declaring the purposes for which the bond was executed, it was *agreed* that it should be lawful for the obligees to commence an action upon the bond, and to proceed to judgment whenever they should think fit, and, upon judgment being obtained, to issue execution; and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them; and judgment having been entered up by virtue of this deed, the obligees issued execution without assigning breaches or executing a writ of inquiry, the Court held that it was a bond substantially conditioned for the performance of an agreement, within the statute 8 & 9 *Wm.* 3, and that the obligees ought to have assigned breaches thereon; and Lord Chief Justice *Abbott* there said (b): “If the execution were allowed to continue, the contrivance would have the effect of defeating a very wholesome act of Parliament, the 8 & 9 *Wm.* 3, c. 11, s. 8, which requires that the plaintiff shall suggest breaches in all actions upon bonds conditioned for the performance of covenants and agreements. I think that this is a case within the statute, and that the plaintiffs were not entitled to issue execution, without having first assigned breaches;” and Mr. Justice *Littleton* said (c): “One of the objects of the statute was, to take away the necessity of proceedings in equity, and to obtain relief against an unreasonable demand of the whole penalty, where small damages only had accrued. If such a case as the present had occurred before the statute, the defendant would have been compelled to seek relief in equity.”—The statute, therefore, must be taken to apply to all contracts, the per-

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(a) 5 Barn. & Cress. 650; S. C.
 8 Dow. & Ryl. 424.

(b) 5 Barn. & Cress. 657.
 (c) *Id.* 659.

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formance of which is secured by a penalty; and here, the warrant of attorney being given in a larger sum, and by way of penalty for securing the annual payment of the annuity, the plaintiff ought to have suggested breaches; which, it is quite clear, he would have been bound to do, if this had been the case of a bond with a penalty conditioned for the payment of an annuity. In *Austerbury v. Morgan*, the question was not discussed; and *Cox v. Rodbard* was not the case of an annuity, for the warrant of attorney was given to secure the payment of a debt by instalments, whilst here, the grant of the annuity is recited in the instrument itself; and the stipulation that judgment should be entered up under the warrant of attorney for the better securing the payment of the annuity, shews that the judgment is in the nature of a penalty, and the writ of execution was improperly sued out, as the plaintiff had not assigned breaches pursuant to the statute.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—

In this case a judgment has been entered up on a warrant of attorney, in an action of debt upon a *mutuatus* for 3,400*l.*, and it appears on the face of the warrant of attorney, that, on the treaty for the purchase of an annuity, it was agreed that such warrant of attorney should be given, and that judgment should be forthwith entered up under it, for the better securing the payment of the annuity:—and this is an application by the defendant, to the Court, to set aside the writ of execution which has been issued for the amount of the arrears of the annuity, on the ground that the plaintiff ought to have suggested breaches of the covenant for the payment of the said annuity, (which covenant appears in the recital contained in the warrant of attorney), under the statute 8 & 9 *Wm.* 3, c. 11, s. 8. That statute enacts, “ That, in all actions

upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nil dicit*, the plaintiff upon the roll may suggest as many breaches as he shall think fit." And the question is, whether a judgment, signed under this warrant of attorney, falls within the letter of the act, or the mischief intended to be prevented thereby? As the law stood at the time this act was passed, if there was a judgment in a Court of law for a penal sum, either upon a demurrer, or upon a *cognovit actionem*, or by default, the defendant was exposed to the danger of an execution for the whole penalty, and had no mode of preventing such an inconvenience but by filing a bill in equity; and the statute was penned to prevent such a mischief, by compelling the plaintiff to shew, upon the record in the Court of common law, the amount of the debt or damages really due, and of enabling the defendant to dispute such amount before a Jury; thus making an appeal to a Court of equity altogether unnecessary. But, a warrant of attorney to enter up a judgment as a security for a debt on demand was known in practice to the Courts of common law long before the passing of the statute of *William*. It was a proceeding subject to their cognizance and interference from the earliest times, and has been regulated by various rules of Court, as the protection of the defendant, or the purposes of justice seem to demand. Such an instrument, therefore, does not appear to be within the mischief of the act; for the Courts of common law, might, at any time, of their own proper jurisdiction, receive an application, and afford redress, if this instrument were made the means of oppression or injustice; and in the present case, if the defendant had by affidavit disclosed any excess in the amount for which the *fieri facias* had issued, beyond the

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arrears of the annuity, the Court would either have set it aside, or, in case of any mistake, have referred it to their officer, or, if necessary, to a Jury, to ascertain for what sum the execution ought to stand. The case of a judgment under a warrant of attorney does not appear, therefore, to have called for the interference of the Legislature; nor does this mode of securing a debt appear to be comprised within the words used in the act, which speaks of judgments by demurrer, confession, or *nil dicit*, and seems rather to apply to such judgments where an action has been really brought by a plaintiff on a bond, or for a penalty, than to this mode of securing an ascertained debt or damage, which was then in use and practice in the Courts. Whilst, therefore, we agree to the authority of the case of *Hurst v. Jennings*, we think that case is not inconsistent with the class of cases in which it is held, that breaches need not be assigned where the judgment has been entered up on a warrant of attorney, given as a security; and we therefore think this rule should be—

Discharged.

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Wednesday,
Feb. 3rd.

DOE on the Demise of Lord TEYNHAM v. TYLER.

THIS was an action of ejectment, and brought to recover the possession of certain estates in the county of *Kent*, which had been appended to the Barony of *Teynham*, in the reign of King *James* the First.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, it appeared that the lands in question were, by deeds of lease and release, bearing date in 1756, settled on the father of the lessor of the plaintiff, in tail male, with remainder, among others, to *Philip Roper*, uncle of the lessor of the plaintiff, in tail male. The point in issue was, whether a recovery suffered at the bar of this Court in *Michaelmas* Term, 1789, by *Henry*, the twelfth Lord *Teynham*, the father of the lessor of the plaintiff, was or was not a valid recovery. The lessor of the plaintiff insisting, that his father was not of sound mind at the time it was suffered, or that, if he were not insane, still, that he was so weak in intellect, or imbecile, as to be influenced, or liable to be practised upon, by certain persons whose interest it was to have the recovery suffered. For the plaintiff, the answers of *Philip Roper*, his uncle, who had been examined on interrogatories at *Calais*, and who was then ninety years old, were offered in evidence, and objected to by the counsel for the defendant, on the ground, that, as the uncle was remainder-man in tail, under the deeds of 1756, he had an interest in the event of the suit, *viz.* a vested right as remainder-man in tail, expectant on the present claimant's title being extinct, and that it was the object of both him and the plaintiff to invalidate the recovery, which, if properly suffered, operated to bar the entail.

To this it was answered, that, although the uncle might have a possibility of interest, still, that it was so remote, as not to affect his competency;—as his nephew, the present

If a person, who is called as a witness, may receive an immediate benefit or injury by the determination of the cause in which he is called, his testimony is not admissible:—therefore, a remainder-man in tail is not a competent witness for a prior tenant in tail, in ejectment brought by the latter to try the validity of a recovery suffered by a former tenant in tail.

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claimant had not only sons but several grandchildren. His Lordship, however, thought that the uncle had an interest in procuring a verdict for the lessor of the plaintiff, and accordingly rejected the answers. The defendant, in order to shew the state of mind of the late Lord *Teynham*, shortly after the recovery was suffered, and that he was competent to discharge the ordinary duties of life, tendered in evidence the accounts of a deceased steward, in which he charged himself with the receipt of certain sums, but at the bottom of the paper were these words, in the steward's hand-writing—"Paid the balance to Lord *Teynham*."

The Jury having looked at the accounts, found a verdict for the defendant.

Mr. Serjeant *Jones*, on a former day in this term, applied for a rule *nisi*, that this verdict might be set aside, and a new trial had, on two grounds—*first*, that the answers of *Philip Roper* had been improperly rejected; and *secondly*, that the steward's accounts ought not to have been received in evidence. *First*, the question is, whether *Philip Roper*, at the time his answers to the interrogatories were taken, had or had not an interest in the result of this suit? Considering his advanced age, and that his nephew, the present claimant, had sons and grandchildren, the interest of the uncle was so remote, that it was next to an impossibility that the estates would ever descend to him or any branch of his family. The earlier authorities respecting the nature of the interest, which disqualified a witness, or rendered him incompetent, went upon very narrow grounds; for, as Lord *Mansfield* said, in *Walton v. Shelley* (a), "The old cases, upon the competency of witnesses, have gone upon very subtle ground. But of late years, the Courts have endeavoured, as far as possible, consistent with those authori-

(a) 1 Term Rep. 300.

ties, to let the objection go to the *credit*, rather than to the *competency* of a witness;" and that principle has been since recognized, and continually acted upon. Although, in *Smith v. Blackham*(a), Lord Chief Justice *Treby* is reported to have said, "An heir apparent may be a witness concerning the title of the *land*, but a remainder-man cannot; for he hath a present estate in the land;" yet that was not only a decision at *Nisi Prius*, but an extra-judicial opinion; for the only question in the cause was, as to the competency of the heir of a bankrupt, who was called to prove a debt due to him, in an action by the assignee; and it was objected, that the surplus of the real estate, (which was only to come in aid of the personal estate), being to go to the bankrupt and his heirs, the heir, by swearing as to the personal estate, had a benefit, *viz.* that he discharged the real estate as to so much. But the Chief Justice allowed him to be a witness, saying, that that was too remote a contingency; and the sentence that follows, *viz.* "Tenant in tail, remainder in tail, he in remainder cannot be a witness concerning the title of these lands; for he hath an estate, such as it is," is a mere note or remark of the reporter, and is not entitled to any weight. Although in *Pyke v. Crouch*(b), it was resolved, that if several estates in remainder be limited in a deed, and one of the remainder-men obtains a verdict for himself in an action brought against him for the same land; that verdict may be given in evidence for the subsequent remainder-man, in an action brought against him for the same land, though he does not claim any estate under the first remainder-man, yet the ground was, that they all claim under the same deed. The son of a person to whom a particular estate is devised, may be admitted to prove the will, because, although he may be biassed, yet he has not a vested interest in the subject matter:—so, the bias which a father

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(a) 1 Salk. 283.

(b) 1 Ld. Raym. 730.

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is presumed to be under, in giving testimony in favour of his son, although it goes to his credit, still he is a competent witness for the son, if he have not a vested interest in the matter in question; and here the ultimate remainder-man had no such interest, but only a remote interest, coupled with a bare possibility. Where two parties claim under the same deed or instrument, the question is, whether the party who is called as a witness claims *through* or *after* the person named in the deed. In the one case, he is a privy in estate, and disqualified; in the other, he is not, as his interest is subsequent to the paramount title of his predecessor. In *Bent v. Baker* (a), Lord *Kenyon* said, "I think the principle is this: if the proceedings in the cause cannot be used for him, he is a competent witness, although he may entertain wishes upon the subject;" and the question has ever since been, whether the verdict or judgment in the cause can be used in a subsequent suit for or against the party who is called as a witness. An executor or administrator is not admissible as a witness, as he claims through his testator or intestate; but as a remainder-man does not claim *through*, but *after* the tenant in tail, it is doubtful whether a verdict for or against the latter could be given in evidence for or against the former; and unless it were evidence against him, it could not be used for him; for, in *Gilbert's Law of Evidence*, it is said (b), "The rule of giving verdicts in evidence on the same point, is to be taken with great restriction; for nobody can take benefit by a verdict, that had not been prejudiced by it had it gone contrary." But a verdict or judgment in ejectment cannot be given in evidence for or against a witness in that suit; for, in *Aslin v. Parkin* (c), Lord *Mansfield*, in treating of this action, says, "This judgment, like all others, only concludes

(a) Term Rep. 33.

(b) 1st edit. quarto, 26, 4th edit. 33.

(c) 2 Burr. 668.

the parties as to the subject-matter of it." In other actions, a distinct point is raised by the issue on the face of the record; but, in ejectment, the record discloses nothing, and the verdict is merely evidence *quoad* the right of possession. Although, in *Doe d. Jones v. Wilde* (a), it was held, that, in ejectment, a tenant in possession is not competent to prove that he was the actual possessor of the land, yet it was not on the ground that the verdict might be given in evidence against him, but, as Sir *James Mansfield* said, "because he comes to rebut a verdict which would have the effect of turning him out immediately; and that is an immediate interest, and outweighs the contrary and remoter effect of his subjecting himself, by his testimony, to an action." Lastly, it is quite clear, that *Philip Roper* had not an immediate interest in the result of the suit; for, Mr. Serjeant *Williams*, in a note to *Jeffreson v. Morton* (b), says, "It is laid down as a general rule, that a reversion expectant on an estate tail is not assets; for it is in the power of the tenant in tail to bar it at his pleasure;" and a number of authorities are referred to, in support of that principle.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—This rule has been moved for on two grounds; *first*, on the exclusion of evidence which ought to have been admitted; *secondly*, on the admission of evidence which ought to have been rejected.

The question as to the first ground of objection is this—Whether the evidence of the remainder-man in tail is admissible on the part of a prior tenant in tail, who has brought ejectment to try the validity of a common recovery, on the ground of the incompetency of the tenant in tail by whom it was suffered; and, as to this objection, we are of opinion, both upon principle, and upon the au-

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(a) 5 Taunt. 183; S. C. 1 Marsh. 7. (b) 2 Wms. Saund. 8 (e), n. 4.

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thority of decided cases, that such evidence is not admissible.

The general rule upon which the incompetency of witnesses is founded, is laid down by Chief Baron *Gilbert*, in his *Law of Evidence* (a), in these terms: "The law looks upon a witness as interested, when there is a certain benefit or disadvantage to the witness attending the consequence of the cause one way." Now, this benefit may arise to the witness in two cases:—*first*, where he has a direct and immediate benefit from the event of the suit itself; and, *secondly*, where he may avail himself of the benefit of the verdict in support of his claim in a future action: and, where the case falls within the first description, in which the interest is more immediate and direct, there is no occasion to have recourse to the second principle, where the interest is one degree removed.

Cases daily occur, in which the witness is rejected upon the first ground. An executor brings an action for a debt due to his testator's estate; the residuary legatee is not an admissible witness, not because this verdict would be evidence for or against him in any future suit, for he can neither be plaintiff nor defendant in an action relating to this debt, but because he receives an immediate benefit by a verdict for the plaintiff. So, the tenant in possession, in ejectment, could not be called to prove the title of the defendant under whom he claims to hold; nor could the landlord be called to prove the title of the tenant who defended the possession; nor, in ejectment, after a *prima facie* case is made out against the defendant, could a witness be called to prove himself the real tenant, and the defendant his bailiff; for, the verdict and judgment in this very action would have the effect of turning him out of possession immediately.

In all these cases, the witness is excluded, not because the verdict would be evidence for or against him in a fu-

(a) 4th Edit. page 106.

ture action, but on account of the immediate benefit or injury he would receive by the determination of the very cause itself. Now, the present case falls within this principle. If Lord *Teynham* recovers in this ejectment, he will be in as of his former right. Nothing is better established, than that the lessor of the plaintiff, when he recovers in ejectment, is in, not merely of the term which he has granted to *John Doe*, but as of the right and title which he has proved in himself. If he has only a chattel interest, he is in as of that term; if he has a freehold, he is in as of that freehold; if tenant in tail, he is in as such tenant in tail. See the judgment of Lord *Mansfield*, in *Taylor d. Atkyns v. Horde* (a).

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Lord *Teynham*, therefore, if he should have recovered a verdict, would have been tenant in tail in possession, under the settlement of 1756. But, by the very same verdict, *Philip Roper*, the proposed witness, would have acquired a vested interest in the remainder in tail, under the same settlement. The seisin of the tenant in tail in possession is the seisin of the remainder-man; the estate in possession and the estate in remainder being, for this purpose, but one estate. It seems, therefore, to us, that, upon principle, the witness had a direct and immediate interest in procuring a verdict which should have the effect of re-vesting his own remainder in tail:—and, upon authority, besides the cases which have been referred to in 1 *Salk.* 283, and 1 *Ld. Raym.* 730, there is an opinion of Lord Chief Justice *Lee*, in the case of *Commings v. The Mayor of Oakhampton* (b): “The person, to whom the remainder of an estate is after the determination of a particular estate limited by a will, cannot be admitted to prove the will; because he has, although it be remote, a vested interest in the matter in question.”

We therefore think, that this rule to shew cause ought

(a) 1 Burr. 114.

(b) Sayer, 45.

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not to be granted on the first ground of objection; but, with respect to the second, without giving any opinion upon the result of the rule, we grant a rule to shew cause.

Rule *nisi* accordingly, upon the second objection.

Wednesday,
Feb. 3rd.

CUMMING and Others, Assignees of CAVANAGH and Others,
Bankrupts, v. BAILY.

Two of three partners, bankers, ordered the doors and windows of the bank to be closed, and a placard was posted on the door, announcing that they had suspended payment:—

Held, that this was beginning to keep house within the third section of the statute 6 Geo. 4, c. 16, and an act of bankruptcy, although neither of the partners lived in the banking-house.

One of three partners, bankers, left his house at Bath, and went to London, to raise funds; and, having failed in

his efforts to do so, he remained there three days;—*Held*, that the Jury were warranted in finding, that he absented himself with an intent to delay his creditors.

A bill of exchange is a chattel, and within the third section of the statute 6 Geo. 4, c. 16; and a fraudulent delivery or transfer of such bill by a trader to a creditor, constitutes an act of bankruptcy.

THIS was an action of trover for the recovery of certain mortgage-deeds, bills of exchange, and other securities for money, and brought by the plaintiffs, as assignees of the estate and effects of *Nathaniel Cavanagh, Henry Brown, and William Brown*, bankrupts. The defendant pleaded the general issue, and gave the plaintiffs notice that he intended to dispute the petitioning creditor's debt, and alleged acts of bankruptcy.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last Term, the facts as to the acts of bankruptcy were as follow:—

Cavanagh and the *Browns* were bankers, and carried on business as such, in co-partnership, at *Bath* and at *Bristol*. *Cavanagh* and *William Brown* resided at *Bath*, the latter occupying the banking-house, and *Henry Brown* lived at *Bristol*. In the latter end of 1825, being about the period of what was termed the general panic, the bank being in great difficulties, and there being a considerable run upon it, *William Brown* went to *London*, on *Monday*, the 12th

December, for the purpose of obtaining money, and returned to *Bath* on the following day, with 6,000*l.* On *Wednesday*, the 14th, he again went to *London*, to endeavour to procure a further supply. On the morning of *Thursday*, the 15th, *Cavanagh* sent a letter to *William Brown*, by a special messenger, stating that his absence had been noticed, and requesting a further supply of money; and that, if he or the messenger did not return with it on *Saturday* morning, the bank could not go on. The messenger returned on *Friday* with 1,000*l.*, and, at the pressing instance of *Cavanagh* and *Henry Brown*, a further sum of 1,000*l.* was sent to *Bath* by the mail, on the evening of *Saturday* the 17th, which arrived in due course, on the *Sunday* morning. *Cavanagh* and *Henry Brown* again wrote to *William Brown*, on the *Saturday*, stating, that they had no funds to meet the demands upon them, and that the bank must stop payment, unless they had a large supply of gold immediately:—they also sent a friend to *London* on the *Saturday*, to urge his return to *Bath*. *William Brown*, on his arrival in town, on *Wednesday* evening, the 14th, went to the *London Coffee House, Ludgate Hill*, and was fully occupied until the following *Saturday* evening, in endeavouring to procure money: when, having failed to do so, he became in such a state of extreme agitation from disappointment, that it was feared he might commit suicide, and, at the persuasion of an acquaintance, he removed to *Stevens's Hotel, Bond-street*, where he was found by the friend who was sent from *Bath* to expedite his return; and no money was raised by him after the *Saturday*. On the morning of *Monday*, the 19th, *Henry Brown* went to *Bath*. The bank remained open the whole of that day; but, in the evening, he and *Cavanagh* came to the determination of stopping payment, unless *William Brown* arrived on the following morning; and he not having made his appearance, the outer door and shutters of the bank at *Bath* continued closed the whole

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of *Tuesday*, the 20th, and a person was sent to *Bristol* to desire the clerks not to open the house there. A placard or notice was placed on the outer door of the bank at *Bath*, informing the public, that, in consequence of the general panic, the firm had been under the necessity of suspending their payments, but that they consoled themselves with the assurance, that the public would not eventually suffer any loss by them. A number of persons assembled in the street, and were extremely clamorous for admission, and continued to knock at the door, but it was not opened, and the windows were kept closed during the whole of that day. On *Wednesday* morning, the 21st, *William Brown* arrived at *Bath*, he having left town on the preceding evening, although he had used no exertion to obtain money since the *Saturday*, and his friend in the interim had been pressing him to return. Finding the bank closed, he expressed great surprise, and caused a private side door to be opened, and desired that any person who called might be admitted to him, but the front door and windows of the bank remained closed, as on the preceding day.

It also appeared, that a sum of 300*l.* having been paid by Lady *Delaware* into Sir *John Perring's* house in *London*, to the credit of the bankrupts, *William Brown* inclosed in a letter to her a bill of exchange to that amount, drawn by Dr. *Daniell* upon, and accepted by *William Smith*; and *William Brown* advised her ladyship that he had sent the bill in order to allay any uneasiness she might feel from the alarming state of the times. This letter, it was proved, came to the hands of Lady *Delaware's* agent, about the *Christmas* week. The commission against *Cavanagh* and the *Browns* was sued out on the 21st *December*, 1825, and an assignment of their estate and effects made to the plaintiffs on the 10th *February*, 1826.

Under these circumstances, his Lordship told the Jury, that, if they thought the closing of the door and windows

of the bank at *Bath* by *Cavanagh* and *Henry Brown*, was a beginning to keep house, or an absenting themselves with an intent to delay their creditors, they had thereby committed an act of bankruptcy; and, as to *William Brown*, his Lordship left it to the Jury to say, whether he had remained in *London bona fide* for the sole purpose of procuring money, or whether, after his exertions had failed, he did not continue there for the purpose of avoiding his creditors; and also, whether he had sent the bill of exchange to *Lady Delaware* before or after the 20th *December*, the commission having issued on the 21st? The Jury, after some deliberation, found a verdict for the plaintiffs, stating, that they thought that *Cavanagh* and the *Browns* had severally committed acts of bankruptcy.

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Mr. Serjeant *Taddy*, in the last Term, obtained a rule nisi that this verdict might be set aside, and a new trial had.—With respect to *Cavanagh* and *Henry Brown*, there was no evidence of their having absented themselves, or begun to keep house, with an intent to delay their creditors in the recovery of their debts. Neither of them resided at the banking-house, and their merely ordering the door and windows to be closed, was not an act of bankruptcy. The words “beginning to keep his house,” in the 3rd section of the statute 6 *Geo.* 4, c. 16, can only apply to the dwelling-house or place of abode of the trader. But there must be some evidence of an absenting or beginning to keep house;—for instance, a denial to a creditor. *Gimingham v. Laing* (a). In *Judine v. Da Cossen* (b), the trader quitted his counting-house without the *animus revertendi*; and, in *Holroyd v. Whitehead*, Lord Chief Justice *Gibbs* said (c): “The bankrupt evidently contemplated his trading as at an end. He had no intention to

(a) 2 Marsh. 236; S. C. nomine
Gillingham v. Laing, 6 Taunt. 532.

(b) 1 New Rep 234.
(c) 3 Camp. 532.

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return"—and the Jury found that he had left his house with intent to delay his creditors, and that a creditor was thereby delayed. But here, there was no proof that *Cavanagh* and *Henry Brown* meant to avoid their creditors, nor did they absent themselves for that purpose.

With regard to *William Brown*, he went to *London* for the express purpose of raising funds, and during his stay there exerted himself to the utmost in so doing. There was, consequently, no evidence of his having absented himself to avoid or delay his creditors; and, on his return to *Bath*, he not only expressed his surprise at finding the bank shut up, but desired that those persons who wished to see him should be admitted. As to the alleged fraudulent transfer of the bill of exchange to *Lady Delaware*, there was no evidence when it came to her hands; it was only proved that it was received by her agent about the *Christmas* week, which might have been after the commission was sued out. Besides, it was not a fraudulent transfer or delivery; and although the words *goods and chattels* in the third section of the statute may include *choses in action*; yet, in *Wrigley v. Bousfield* (a), Lord Chief Justice *Best* expressly ruled, that bills of exchange could not be considered as goods and chattels, and consequently that they were not within the terms or meaning of the clause in question.

Mr. Serjeant *Wilde* and Mr. Serjeant *Russell* now shewed cause.—The closing the outer door and shutting up the windows of a public banking-house by the direction of two of the partners, *viz. Cavanagh* and *Henry Brown*, was an unequivocal act of bankruptcy by them. Their creditors had a right to present their notes for payment during the usual hours of business: and not only was the door closed, but a notice or placard was stuck up, informing the public

(a) *Sittings at Guildhall after Trinity Term, 1828, not reported.*

that the firm had been compelled to suspend their payments. In *Dudley v. Vaughan* (a), Lord *Ellenborough* ruled, that a trader beginning to keep house with intent to delay his creditors, was sufficient to constitute an act of bankruptcy, though he were only denied to be seen, but not denied to be at home; and, in *Gillingham v. Laing*, where a news-vender, who frequented the *Royal Exchange* for the purpose of collecting intelligence for a newspaper, appointed a creditor to meet him there, and afterwards told a friend, if the creditor inquired there for him, to say he was not there, it was held, that this was an absenting himself within the statute 1 *Jac.* 1, c. 15, s. 2, and an act of bankruptcy. An absenting, therefore, is not confined to an absence from the dwelling-house, but may apply to any place from whence a trader absents himself with intent to delay a creditor.

With respect to *William Brown*, although he went to *London* for the purpose of raising money to meet the demands made on the bank at *Bath*, yet his remaining there from the *Saturday* to the *Tuesday* evening following was a circumstance from which the Jury might infer that he continued there during that interval for the purpose of avoiding his creditors; and although he might have quitted *Bath* for a laudable purpose, yet, if he stayed in *London* an unreasonable time, and from a dread to meet his creditors, it was clearly an act of bankruptcy. But, at all events, his sending the bill of exchange to *Lady Delaware* was a fraudulent transfer of a chattel, within the meaning of the statute 6 *Geo.* 4, c. 16, s. 3. Mr. Justice *Blackstone* says (b), "Chattels *personal* are, properly and strictly speaking, things *moveable*, which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals,

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(a) 1 Camp. 271; S. C. 9 East, 491, n.

(b) Vol. 2, 387.

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household stuff, money, jewels, corn, garments, *and every thing else that can properly be put in motion, and transferred from place to place.*" In *Bullock v. Dodds*(a), it was decided, that an attainder might be well pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainder; and Lord Chief Justice *Abbott*, in delivering the judgment of the Court, said (b), "From the time of *Slade's* case (c) to the present, debts by simple contract have been constantly seized into the King's hands, upon outlawry. Indeed, the words *bona et catalla*, jointly or separately, in our ancient statutes and law-writers, denote personal property of every kind, as distinguished from real." In *Comyns's Digest*(d) it is laid down, that, if a man be attainted or outlawed, he forfeits all his goods and chattels:—so, a *chose in action*, as a bond, covenant for payment of money, &c.; and, by the statute 17 *Edw. 2*, c. 16, the King shall have the goods of all felons attainted, wheresoever they be found. So, in *Hawkins's Pleas of the Crown*(e), it is said, "All things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath, or is entitled to in his own right, are liable to forfeiture in cases of treason or felony." In *Ryall v. Rolle*, Lord *Hardwicke* said (f), "A bond debt is a chattel. Suppose a trader assigns over a bond, and the assignee permits him to keep the bond in his possession, why should not that be within the mischief of the statute of *James*? Every man, in his own trade, is in possession of the *choses in action* that arise from his own goods, and can put another in possession, either by giving him the securities, or by admitting him a partner for such

(a) 2 Barn. & Ald. 258.

(e) Cap. 49, s. 9.

(b) Id. 276.

(f) 1 Atk. 171, 2; S. C. 1 Vez. 362.

(c) 4 Rep. 93.

(d) Tit. "Forfeiture," B. 3.

a share." And in the late case of *Hornblower v. Proud* (a), it was expressly decided, that bills of exchange might be considered as goods and chattels in the order and disposition of a bankrupt, at the time of his bankruptcy, within the statute of *James*, and consequently, that they pass to his assignees. And here, as *William Brown* believed the bill in question to be a valid and subsisting security, and voluntarily transferred it to Lady *Delaware*, it was an act of bankruptcy; and there was sufficient evidence for the Jury to infer that the bill was transmitted to her before the day on which the commission was sued out.

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Mr. Serjeant *Taddy* and Mr. Serjeant *Bompas*, in support of the rule.—Although bills of exchange form part of a bankrupt's estate, and pass to his assignees, and, since the case of *Harman v. Fisher* (b), the transfer of them by a trader to a particular creditor must be deemed a fraudulent preference, yet the words "goods and chattels" do not necessarily include them. Here, the question arises on the third section of the statute 6 Geo. 4, which makes any fraudulent gift, delivery, or transfer of any of a trader's goods or chattels, an act of bankruptcy. A fraudulent transfer of property was formerly considered a crime, and punishable at law. In *Calye's* case (c), it was resolved, that *bona et catalla* are confined to mere personal goods and chattels, and do not extend to every species of personal property of which a man may be possessed. The Legislature might have intended that the words "goods and chattels," in the third section, should be taken in a limited or restricted sense, particularly, as a transfer of them made with a fraudulent view, or preference of a particular creditor, subjects the party transferring to the operation of the bankrupt laws. The late statute has two objects in view—the one, as against the person of the bank-

(a) 2 Barn. & Ald. 327.

(b) Cowp. 117.

(c) 8 Rep. 33.

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rupt—the other, as to the equal distribution of all his estate and effects among his creditors. The clauses which affect the bankrupt himself, are in their nature penal, and must receive a strict construction; whilst those which relate to the distribution of his estate are of a remedial nature; and in *Bones v. Booth* (a), the distinction was taken where a statute contains clauses, some of which are penal, and others remedial; as, in an action on the statute 9 *Anne*, c. 14, to recover back money lost at play, Mr. Justice *Nares* said, that the statute was remedial where the action is brought by the party injured, but penal where brought by a common informer. The operation, therefore, of the third section of the 6 *Geo.* 4, being of a penal nature, the words *goods and chattels* may be taken in a limited sense, and as applicable only to personal articles of a moveable nature, and not to extend to *choses in action*, bonds, deeds, bills of exchange, or other securities of a like nature. Besides, two acts of bankruptcy are created by a fraudulent transfer by the bankrupt—*first*, by his procuring his goods, money, or chattels to be attached, sequestrated, or taken in execution—and *secondly*, by his making, or causing to be made, any fraudulent gift, delivery, or *transfer* of any of his goods or chattels, from whence the inference necessarily arises, that the fraudulent transfer was meant to be confined to such goods and chattels as might be the subject of attachment or sequestration, or taken in execution; and this is the more apparent, because, where the Legislature have intended the statute to apply to bills of exchange, they have so expressed it; for, the 73rd section enacts, “that, if any bankrupt, being at the time insolvent, shall have conveyed, assigned, or transferred to any person, any goods or chattels, or have delivered or made over any *bills*, bonds, notes, or other securities, the

(a) 2 Sir Wm. Bl. 1226.

commissioners shall be empowered to sell and dispose of the same." There is, consequently, a manifest distinction between those two clauses, as, in the one, which makes the transfer void, so as to vest the bankrupt's goods in the commissioners, bills of exchange are expressly designated; but, in the other, no mention whatever is made of them. In the case of *The King v. Croke*, Lord *Mansfield* said (a): "A special authority, delegated by act of Parliament to particular persons, to take away a man's property and estate against his will, must be strictly pursued;" and here, by the 3rd section of the statute, all the bankrupt's property is vested in his assignees, in case he commit an act of bankruptcy within the intent and meaning of that clause: and in the case of *The King v. Morris*, Mr. Baron *Perryn* said (b), "that the majority of the Judges were of opinion, that bank-notes are not goods and chattels within the meaning of the statutes, 3 *Wm. & Mary*, c. 9, and 5 *Anne*, c. 31." So here, bills of exchange are not goods and chattels within the 3rd section of the 6 *Geo.* 4, which is in its nature penal, and must, therefore, receive a strict construction.

But, even supposing the sending of the bill in question by *William Brown* to Lady *Delaware* might be deemed a fraudulent transfer or delivery, yet there was no evidence to shew that the letter containing it ever came to her hands, or that it was sent to her before the date of the commission:—at all events, there was no evidence of a beginning to keep house by *Cavanagh* and *Henry Brown*, nor was there any proof that they absented themselves from the bank at *Bath*, or caused themselves to be denied to their creditors. Neither of them resided at the bank, and *William Brown* was the active or managing partner, who was absent in *London*, endeavouring to raise funds for the purpose of satisfying the cre-

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(a) Cowp. 29.

(b) Leach's Crown Cases, 3d edit. Vol. 2, p. 530.

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ditors of the firm, who were then struck with the general panic which pervaded the whole country.

Lord Chief Justice TINDAL.—I think that this rule for a new trial ought to be discharged. The question is, whether the evidence adduced at the trial is sufficient to establish that several acts of bankruptcy had been committed by three persons named *Nathaniel Cavanagh*, *Henry Brown*, and *William Brown*, who carried on business as bankers at *Bath* and at *Bristol*. The Jury found in the affirmative, and I am of opinion that they came to a proper conclusion. The acts of bankruptcy by *Cavanagh* and *Henry Brown* are perfectly distinct from those committed by *William Brown*. The two former, finding themselves in insolvent circumstances, directed that the door and shutters of the windows of the bank at *Bath* should not be opened on the morning of *Tuesday*, the 20th of *December*, and they remained closed during the whole of that day, notwithstanding several persons were outside, and clamorous for admission; and the question is, whether that was not a beginning to keep house within the meaning of the statute 6 Geo. 4, c. 16, s. 3. The words beginning *to keep his house*, are not, as has been contended for the defendant, to be confined to the *dwelling-house* of the trader or party who commits an act of bankruptcy by beginning to keep his house; for, the statute appears to me to apply more appropriately to the place where the business is carried on, and where the creditors of the trader may naturally expect to find him, rather than at his dwelling-house, when it is apart from his place of business. It might fairly be inferred that *Cavanagh* and *Henry Brown* were within the banking-house at the time their creditors were clamorous without, for there was no evidence that either of them was absent. I therefore think it is difficult to conceive a more unequivocal or express act of bankruptcy. With respect to *William Brown*, the acts of

bankruptcy were two-fold, and I left it to the Jury to say—*first*, whether he had absented himself from his place of business for the *bond fide* purpose of endeavouring to obtain money, or whether he remained absent for a longer period than was necessary for that purpose, and with an intent to avoid or delay his creditors—and *secondly*, whether the sending the bill of exchange to Lady Delaware, was a fraudulent transfer, and made in contemplation of bankruptcy? As to the first act of bankruptcy, the evidence was, that he went to *London*, on *Wednesday* the 14th of *December*, for the purpose of raising money to answer the demands made on the firm at *Bath*; that, during his stay in town, he received a letter from his partners, urging his return; and that a special messenger was also sent to him, who entreated him to return immediately, and told him that the house could not go on unless he did so, or transmitted money, he having been previously employed in endeavouring to obtain it. The question then is, whether he was so employed during the whole of the time he remained in *London*; or whether, after his exertions had failed, he did not remain there for the purpose of avoiding his creditors. The messenger who was sent to him did not find him in the city, or at the coffee-house where he first lodged, but at the *West* end of the town, and in such distress of mind as to give rise to an apprehension that he had a design to put a period to his existence. Under these circumstances, it was for the Jury to say, whether his stay in *London* was not protracted from a dread or disinclination to meet his creditors. The Jury exercised their discretion, the question being purely for their consideration; and I cannot say that I am dissatisfied with their finding.

As to the question of fraudulent preference, the facts proved were these:—Lady Delaware having paid 300*l.* into Messrs. *Perring & Co.*'s bank in *London*, to the credit of the bankrupts, *William Brown*, at the latter end

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of *December*, 1825, *vis.* about the *Christmas* week, wrote her a letter, in which he said, that, considering the alarming state of the times, and to allay any apprehension or uneasiness she might feel, he had inclosed a security to the amount of the money she had paid in. The letter contained a bill of exchange for 300*l.*; and, assuming, as the Jury have found, that it was written and sent by *William Brown*, previously to the 20th *December*, the question is, whether this was or was not a voluntary preference, and made in contemplation of bankruptcy. I have no doubt that it was; but it has been said, that a bill of exchange does not fall within the meaning of the words “goods or chattels,” in the third section of the statute 6 *Geo.* 4, c. 16, which enacts, that, if any trader shall make, or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels, he shall be deemed to have thereby committed an act of bankruptcy. In common acceptation, bills of exchange and promissory notes may be included under the words “goods and chattels; but the question is, whether that sense can also be put on the same words in other clauses of the statute; so that it may receive a uniform construction throughout. Undoubtedly, in some of the old books, we find that *choses in action* were not considered as *goods and chattels*. But, in later times, a different opinion has prevailed, and those words have received a wider construction, and been deemed to include not only things that pass by manual delivery, but bills of exchange; an instance of which is presented by the form of the present action, which is trover for the conversion of the bills. It seems to me to be no answer to say, that bills of exchange have not been esteemed chattels under certain statutes inflicting punishment for criminal acts. Before the statute of *Anne*, there was no law applicable to bills of exchange; but the clause in question seems to me to embrace them, particularly when a party, by his

own voluntary act in the transfer or delivery, commits an act of bankruptcy, and makes himself amenable to the bankrupt laws; and the committing of such an act is not now looked upon as a criminal offence, for a trader may commit an act of bankruptcy, by merely declaring his insolvency in the *Gazette*. But the same language is used in the 72nd section of the statute, which empowers the commissioners to sell and dispose of any *goods or chattels* in the possession, order, or disposition of the bankrupt, by the consent of the true owner, and whereof the bankrupt was the reputed owner; and, in the case of *Hornblower v. Proud*, the Judges of the Court of *King's Bench* were unanimously of opinion that bills of exchange having come to the possession of the assignees of a bankrupt, they must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy, within the statute of *James*. But it has been said, that the 73rd section of the 6 Geo. 4, leads to a different conclusion, as bills and notes are therein distinctly specified. That section enacts, that, if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration), have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods or chattels; or have delivered or made over to any such person, any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same, and every such debt shall be valid against the bankrupt and such children and persons as aforesaid, and against all persons claiming under him. Now, it appears to me, that one may easily discover the reason why bills, bonds, and notes were particularly specified in that clause. The first part of the enactment applies to cases where the conveyance or transfer by the bankrupt is by deed, and the subsequent part relates to a transfer by the

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manual delivery of the securities therein enumerated, and without which delivery or transfer bills and notes would not usually pass. So, in the 3rd section, the words are, *gift, delivery, or transfer* of any goods and chattels, which cannot apply to a conveyance or assignment by deed. Upon the principle, therefore, of giving the same construction to the same words in different clauses of the same statute, I think that the words “goods and chattels” in the 3rd section, are sufficiently large to embrace and include bills of exchange, and therefore, that the transfer of the bill in question by *William Brown* to Lady *Delaware*, a customer and creditor of the firm, was a fraudulent transfer, within the terms and meaning of the 3rd section of the statute, and that he thereby committed an act of bankruptcy. To hold otherwise, would be giving the statute a very narrow and limited construction, and it would be too much to say, that a banker, whose most valuable property frequently consists of bills of exchange and promissory notes, could not commit an act of bankruptcy by a fraudulent transfer of them to a particular or favoured creditor, to the exclusion of the creditors at large. The Jury might fairly infer from the terms of the letter in which the bill was inclosed, that it was sent by *William Brown* to Lady *Delaware*, and received by her, before the day on which the commission was issued. He would not have expressed himself in such terms after the bank had stopped payment. He had it in contemplation that such an event might and probably would take place. At all events, there was sufficient evidence to go to the Jury; and I am not prepared to say that they have come to a wrong conclusion.

Mr. Justice PARK.—I am entirely of the same opinion upon all the points, and on which my Lord Chief Justice has expressed himself so fully. As far as regards *Cavanagh* and *Henry Brown*, the facts in the case of *Dudley v. Vaughan*, which was decided twenty-two years ago, and

the doctrine of which has never since been disputed, appear to me to bear a strong resemblance to the present. There, a trader, who had been in the constant habit of sitting, during business hours, in his counting-house on the ground floor, where there was a ready access to him, ceased to appear there, but sat in a parlour above stairs, and, his circumstances being much embarrassed, he desired his clerks to say to any of his creditors who should call, that, on account of the stoppage of a house in *Ireland*, he was obliged to suspend his payments—Lord *Ellenborough* said (a): “If a trader shut himself up in his house, debarring all access to him, whereby his creditors are delayed, an act of bankruptcy is established by proof of his having done so. And, generally, if a trader seclude himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he *begins to keep house*, within the meaning of the Legislature, and commits an act of bankruptcy.” There, as here, the question of intent was left to the Jury, and it appeared that two of the partners of the firm directed the doors and windows of the banking house to remain closed and shut up, although several of their creditors were clamorous for admission, a placard having been placed on the door, informing the public that the firm had been compelled to suspend their payments. I am quite clear, that, as far as regards the partners at *Bath*, they committed acts of bankruptcy. As to whether *William Brown* committed an act of bankruptcy by remaining in *London*, it was purely a question for the consideration of the Jury; and I concur with them in their finding in the affirmative. Although, if a trader leave his house or place of business for the *bonâ fide* purpose of obtaining money, it is not an act of bankruptcy; yet, if he fail to accomplish his object, and delay his return from a fear or dread to face his creditors, the Jury may reasonably infer that he there-

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(a) 1 Camp. 272.

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by sought to avoid or delay such creditors; which is clearly an act of bankruptcy within the meaning of the 3rd section of the statute 6 *Geo.* 4, c. 16: and, if a trader commit any one act of bankruptcy, it is sufficient to bring him within the operation of that act.

As to the fraudulent transfer or delivery of the bill of exchange to *Lady Delaware*, it was clearly done with a view to a fraudulent preference. The arguments, therefore, as to the construction of a penal clause, or a criminal statute, do not appear to me to apply. Although, formerly, the committing an act of bankruptcy was looked upon as a crime, yet it has long ceased to be so considered. The 72nd section of the statute 6 *Geo.* 4, contains the same words as the 11th section of the statute 1 *Jac.* 1, c. 15, s. 5, *viz.* that, if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner, have in his possession, order, or disposition, any *goods or chattels* whereof he was reputed owner, the commissioners are empowered to sell the same, for the benefit of the creditors under the commission. Besides, the late act is to be construed beneficially for creditors (*a*); and, in the case of *Hornblower v. Proud*, the question as to whether bills of exchange fell within the description of goods and chattels in the order and disposition of the bankrupt, within the operation of the statute of *James*, was fully considered, and it was expressly decided that they did; and Lord Chief Justice *Abbott* said: "It has been held, that debts are within that statute; if so, *a fortiori*, bills of exchange must be so;" and Mr. Justice *Holroyd* said: "No case can be cited, to shew that bills of exchange are not within the act. I am clearly of opinion that they are both within the words and the mischief contemplated by the Legislature." But, it has been said, that Lord Chief Justice *Best* has since ruled the contrary at *Nisi Prius*, in the case of *Wrigley v. Bousfield*; yet, as he concurred with

(*a*) See section 135.

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the rest of the Court in *Hornblower v. Proud*, it is difficult to suppose that he should have changed his opinion; for, he there said (a): "I think that this case falls within the statute of *James*. The cases cited from *Chancery* seem to me to be authorities in favour of this position, for they turn expressly on the mode in which the bills of exchange came into the possession of the bankers. Now, that consideration was wholly unnecessary, unless it had been admitted law, that bills of exchange *per se* were within the words of the act. Those words are 'goods and chattels,' which mean all personal property, the title to which is evidenced by possession."—As to whether the bill of exchange came to the hands of Lady *Delaware* before the day the commission was sued out, was a question for the Jury, and most properly left to them. But it appears to me, that, independently of the transfer or delivery of the bill, *William Brown* committed an act of bankruptcy by his protracted stay in *London*, after he found that any further efforts to raise money there would be of no avail.

Mr. Justice GASELEE.—My Lord Chief Justice and my brother *Park* having gone so fully into all the circumstances of this case, I need only express my entire concurrence. As to the acts of bankruptcy by *Cavanagh* and *Henry Brown*, there is not a shadow of doubt: and as to those committed by *William Brown*, they were most properly left to the Jury, and there is no reason to say that they came to an erroneous conclusion. The case of *Hornblower v. Proud* is a decisive authority to shew that bills of exchange fall within the words "goods and chattels;" and the statute 6 Geo. 4 must, in that respect, receive the same construction as the statute of *James*.

Mr. Justice BOSANQUET not having been in Court during the former part of the argument, declined giving any opinion.

Rule discharged.

(a) 2 Barn. & Ald. 335.

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In an action by the drawer against the acceptor of a bill of exchange, the latter obtained a rule to stay proceedings, on payment of debt and costs, and the delivery of the bill to him:—*Held*, that the rule was complied with, by the delivery of the bill by the plaintiff, although he had obliterated his name and cancelled the date; for, if the defendant had sustained an injury by the erasures, he had his remedy by action.

TOMLINS v. LAWRENCE.

THIS was an action on a bill of exchange, drawn by the plaintiff upon and accepted by the defendant. The consideration for the bill was, coals sold and delivered by the plaintiff to the defendant.

Mr. Serjeant *Taddy*, on a former day in this Term, obtained a rule *nisi*, that all further proceedings in the cause might be stayed, on payment of debt and costs, and that the plaintiff should deliver up the bill to the defendant.

Mr. Serjeant *Wilde* now shewed cause, and stated, that the plaintiff had offered to deliver up the bill, but that the defendant had refused to take it:—and, on its being produced, it appeared that the plaintiff's name had been erased as well as the date, and that every material part of the bill was, in fact, cancelled and obliterated.

Mr. Serjeant *Taddy* submitted, that the delivery of a bill, which had, in fact, been rendered a nullity by the act of the plaintiff whilst in his custody, was not a compliance with the rule. It is, in fact a piece of waste paper, as it bears none of the qualities of a bill of exchange, nor does it even resemble such an instrument. The defendant, therefore, is entitled to have the proceedings stayed, without payment of either debt or costs.

Lord Chief Justice TINDAL.—The delivery of the paper to the defendant is, in fact, a compliance with the terms of the rule, and, if he has sustained any injury by the improper spoliation of the bill, he has his remedy by action. It certainly raises a strong suspicion that the plaintiff has acted improperly. I think, therefore, that the

rule ought to be made absolute, but without costs on either side.

Rule absolute accordingly.

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TOMLINS
v.
LAWRENCE.

JOYCE v. PRATT.

Thursday,
Feb. 4th.

THE defendant was arrested on the 5th *January* last, on a *capias ad respondendum*, sued out against him at the suit of the plaintiff, returnable in eight days of *St. Hilary*. Bail was given to the Sheriff for the defendant's appearance on the return day, *viz.* the 20th *January*; but, on the day preceding, namely, the 19th, he was convicted at the *Old Bailey* Sessions, for stealing a quantity of bristles; but judgment was respited, a point of law being reserved for the opinion of the twelve Judges.

Mr. Serjeant *Andrews*, on a former day in this Term, on behalf of the bail to the Sheriff, obtained a rule, calling on the plaintiff to shew cause why the bail should not have till the fifth day of next *Easter* Term, or until two days after the opinion of the twelve Judges should have been known, to put in and perfect special bail for the defendant, or to render him in their discharge.

Mr. Serjeant *Jones* now shewed cause. There is no ground for this application; and it cannot be supported, either by authority or on principle. There is a manifest distinction between bail to the Sheriff and bail above. The former are not entitled to relief, or the indulgence now asked. Bail to the Sheriff cannot render their principal; they merely enter into an obligation for the defendant's appearance; and, until appearance, the plaintiff's proceedings are stayed. In *Harrison v. Davies* (a),

The defendant, on being arrested, gave bail to the Sheriff for his appearance; but, before the return of the writ, or putting in and perfecting bail above, he was convicted of felony, and remained in criminal custody, until the opinion of the twelve Judges, upon a point reserved, should be ascertained. The Court, upon payment of costs by the bail below, and putting the plaintiff in the same situation as if bail above had been put in in due time, allowed four days for putting in and perfecting special bail, although the time for so doing had expired when an application was made by the bail below, to enlarge the time for perfecting special bail, or rendering the defendant in their discharge.

(a) 5 Burr. 2683.

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it was held, that the surrender of the defendant before the return of the writ, was no reason for staying proceedings upon the bail-bond; and Lord *Mansfield* said: "It is a settled point, that nothing can be a performance of the condition of the bail-bond, but *putting in bail*." Although, in *Sharp v. Sheriff* (a), the Court of *King's Bench*, on the application of bail, granted a *habeas corpus* to the Sheriff, in whose custody the defendant was under a charge of felony, to bring him up, in order that he might be surrendered by his bail, yet the Court held, that the bail must justify before they were entitled to make the application. But bail to the Sheriff cannot render their principal; and here the application was not made until after the return of the writ; and nothing can relieve them, but putting in and justifying bail above. And in *Walsh v. Davies* (b), this Court refused to grant a *habeas corpus* to bring up a prisoner in custody upon a criminal matter, in order to charge him with a declaration in a civil action.

Lord Chief Justice TINDAL.—It appears to me, that the justice of this case is, that, upon payment of costs, and on the bail to the Sheriff undertaking to place the plaintiff in the same situation as if bail above had been put in and perfected in due time, four days be now allowed for putting in and perfecting such bail.

The rest of the Court concurring, the rule was, on these terms, made—

Absolute.

(a) 7 Term Rep. 226.

(b) 2 New Rep. 245.

1830.

Thursday,
Feb. 4th.RATHBONE *v.* JOHN DRAKEFORD and DAVID DRAKEFORD.

THE plaintiff, by this action, sought to recover the sum of 14*l.* 18*s.* for money paid by him to the use of the defendants jointly. On the 12th *November* last, the defendant *David Drakeford* gave the plaintiff a *cognovit* for the amount of the debt and costs to be taxed as between attorney and client, upon which judgment was entered up and execution sued out against both the defendants.

After a partnership has been dissolved, one of two partners has no power to bind the other in an action brought against both jointly, by giving a *cognovit* to pay the debt and costs as between attorney and client:—and the *cognovit* having been given without the knowledge or assent of the co-defendant, the Court set aside a judgment and execution which had been entered up and sued out thereon.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule calling on the plaintiff to shew cause why the judgment and execution should not be set aside, upon an affidavit of the defendant *John Drakeford*, that he and *David*, were partners as dealers in silk; that the former resided at *Manchester* and the latter in *London*; that the sum in question was paid by the plaintiff at the request of *David* alone, on the 17th *June* last; and that notice of the dissolution of the partnership was published in the *London Gazette* in the month of *July* following; that he, *John Drakeford*, had never authorized the plaintiff to pay any sum on account of the partnership, and had never heard that the plaintiff had made any payment on account thereof; and that the *cognovit* given by *David* was signed by him without the knowledge, consent, or authority of *John Drakeford*, nearly four months after the dissolution of the partnership.

Mr. Serjeant *Taddy* now shewed cause, on an affidavit of the plaintiff, which stated, that he, at the request of the defendant *David Drakeford*, paid the amount of the sum sought to be recovered in this action to one *Cowper*, who alleged himself to be a creditor of the defendants *John* and *David Drakeford*, who carried on business as

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partners; that the latter acknowledged that the firm was indebted to *Cowper* in the above sum, and afterwards told the plaintiff that *John Drakeford* had authorized him (*David*) to give the *cognovit*. The question, then, is, whether one of two defendants (partners) may confess a judgment in a joint action against both? In *Brutton v. Burton* (a), a warrant of attorney under seal, executed by one defendant for himself and his partner, in the absence of the latter, but with his consent, was held to be a sufficient authority for the plaintiff to sign judgment against both; and here, the plaintiff was warranted in signing judgment against both the defendants, as *David Drakeford* told him that *John* had authorized him to sign the *cognovit*. Where one of two co-plaintiffs executes a release, the Court will not set it aside or control his power to do so, except upon a very strong case of fraud. *Jones v. Herbert* (b), *Arton v. Booth* (c), *Furnival v. Weston* (d); neither will they control the power of a co-defendant to give a *cognovit* in a joint action against himself and his partner. An acknowledgment of a debt by one partner, although made after dissolution of the partnership, is binding on his co-partners; and here, there is no suggestion of fraud; and, although the *cognovit* was given after the dissolution of the partnership, the plaintiff's cause of action arose on a debt incurred during the partnership, and the only communication was between him and the defendant *David Drakeford*, *John Drakeford* being resident at *Manchester*.

Mr. Serjeant *Wilde*, in support of his rule.—It is quite clear that the conduct of *David Drakeford* was a fraud on his partner *John*, as he has positively sworn, not only that he had never authorized the plaintiff to pay any sum

(a) 1 Chit. Rep. 707.

(b) 7 Taunt. 421.

(c) 4 B. Moore, 192.

(d) 7 B. Moore, 356.

on account of the partnership, but that the *cognovit* was given without his knowledge or consent.

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v.
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Lord Chief Justice TINDAL.—It appears to me to be quite clear, that, after the partnership was dissolved, the defendant *David Drakeford* had no authority to bind *John* without his consent, or to give a *cognovit* for the payment of debt and costs as between attorney and client, although the debt might have been contracted before the partnership was dissolved—

The rest of the Court concurring—

Rule absolute.

TAYLOR v. WILLANS.

Friday,
Feb. 5th.

AT the trial of this cause, before Lord Chief Justice Tindal, at *Westminster*, on the 23rd day of *December* last, a witness of the name of *Crockford*, not having obeyed a *subpœna*, nor been in attendance when the cause was called on, which was specially appointed for that day, the plaintiff was nonsuited.

To render a person liable to an attachment for not attending upon a *subpœna*, it is incumbent on the party applying to state that he was a material and necessary witness for him:—
Quære, whether it be necessary to produce the original writ of *subpœna* at the time of service of the copy.

Mr. Serjeant *Cross*, on a former day in this term, obtained a rule *nisi*, for an attachment against *Crockford* for non-attendance.

Mr. Serjeant *Wilde* now shewed cause, on an affidavit of *Crockford*, which stated, that he resided in *St. James's Street*; that the original writ of *subpœna* was not produced or shewn to him at the time he was served with a copy, nor was any conduct money offered or tendered to him; and that *Crockford's* attorney had advised him, that the service of the copy of the *subpœna*, without the produc-

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tion of the original, was irregular, and that he was not required by any rule of this Court to attend at the trial. The learned Serjeant submitted, that, in order to render a party liable to an attachment for contempt of the process of the Court, as in the case of a *subpœna*, the original writ should be shewn at the time of service.

Mr. Serjeant *Cross*, in support of his rule, produced affidavits, which stated, that a copy of the *subpœna* was delivered to *Crockford* at the time of service, and that one shilling was tendered to him for conduct money; but it was not sworn that he was a necessary or material witness for the plaintiff, or that he believed that he might have given material evidence on his behalf.

Per Curiam.—We think that the plaintiff ought to have stated that *Crockford* was a necessary and material witness for him. The plaintiff has his remedy by an action for damages on the statute 5 *Elisabeth*, c. 9. It is doubtful whether it was necessary to produce the original writ of *subpœna* at the time of service, for it seems from the case of *Wakefield v. Gall* (a), that the name of a witness, though not in the original *subpœna*, may be inserted therein at any time, if he have been regularly served with a copy. However, as the plaintiff has not sworn that he believes that *Crockford* was a material and necessary witness for him, the rule for the attachment must be—

Discharged (b).

(a) Holt's Rep. 526. (b) See Tidd's Practice, 9th edit. Vol. 2, 805-7.

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Monday,
Feb. 8th.

FOSTER and Another v. CHARLES.

THIS was an action on the case, and brought against the defendant for giving the plaintiffs a false representation of the character and circumstances of one *James Jacque*. The first count of the declaration stated, that the plaintiffs, before and at the time of the committing the grievances thereafter mentioned, carried on, and from thenceforth hitherto had carried on trade and business as dealers in tea and other goods, to wit, at *London*;—and thereupon the defendant, theretofore, to wit, on the 10th *December*, 1824, contriving, and fraudulently intending, craftily and subtilly to deceive and injure the plaintiffs, and to induce them to employ a certain person, to wit, one *James Jacque*, as their agent in the said business, at *Manchester*, in the county of *Lancaster*, to obtain and receive orders for goods to be supplied by the plaintiffs, and to receive and collect monies on their account, in the way of their said business, for certain commission and reward to him (*Jacque*) payable in that behalf; falsely, fraudulently, and deceitfully represented and asserted to the plaintiffs, that the said *James Jacque* had then an excellent connection in that line at *Manchester* and the neighbourhood, and that the house for which he had done business there was no longer able to execute his extensive orders:—by means and in consequence of which representation, the plaintiffs, and one *William Foster*, and one *John Holgate*, who, at the time next thereafter mentioned, were partners of the plaintiffs in the said business, not knowing to the contrary, but believing therefrom that the said *James Jacque* had, at the time of such representation, an excellent connection in the line of such agency as aforesaid at *Manchester*, and had obtained extensive orders there for some house, were induced to hire and engage, and did afterwards, to wit, on &c., at *London*, hire and engage the

Where the defendant recommended an agent to the plaintiffs, with a knowledge that his representation of the character of the agent was false:—*Held*, in an action on the case, to recover damages for the misconduct of the agent, that it was not necessary for the plaintiffs to prove a malicious or interested motive by the defendant for the misrepresentation:—If what the defendant said was false within his own knowledge, and occasioned an injury to the plaintiffs, it is a sufficient ground of action.

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said *James Jacque*, as such agent, in their said business at *Manchester* aforesaid, for certain commission and reward to him (*Jacque*) payable in that behalf; and did instruct and authorize him, in that capacity, to obtain and take orders for the sale and supply of goods by the plaintiffs and their partners in the said business, and to collect and receive monies for and on account of the plaintiffs and their partners, in the way of the said business; and the said *James Jacque*, under and by virtue of that employment, did afterwards, to wit, on &c., at *Manchester* aforesaid, to wit, at *London*, obtain and take orders for the sale and supply of goods by the plaintiffs and their partners in the said business, to divers persons, to a large amount and value, and to collect and receive, for and on account of the plaintiffs and their partners, in the way of the said business, from divers persons, divers sums of money;—whereas, in truth and in fact, at the time the defendant so represented and asserted as aforesaid, the said *James Jacque* had not an excellent or any connection, in the line of such agency, at *Manchester* aforesaid, or its neighbourhood, as the defendant then well knew;—and whereas, in truth and in fact, at the time last aforesaid, the said *James Jacque* had not obtained extensive orders, or any orders, at *Manchester* aforesaid, for any house whatsoever, as the defendant well knew.

The plaintiffs then averred, that the said *James Jacque*, for want of a good and sufficient connection in the line of such agency, at *Manchester* and its neighbourhood, did, under and by virtue of his said employment, obtain orders for the sale and supply of goods on credit, by the plaintiffs and their partners in the said business, to divers customers of worse and less respectable characters and circumstances than he otherwise would have done; and did thereby induce the plaintiffs and their said partners, who were ignorant of the characters and circumstances of such customers, to sell to them on credit, and supply them with goods, pursuant to such

orders, such goods being, in the whole, of large value, to wit, of the value of 2,000*l.*; and, although the prices for which those goods were so sold ought long since to have been paid and satisfied to the plaintiffs and their partners, yet those customers, by reason of such their characters and circumstances, had hitherto refused and neglected to pay for the same, and the said goods were wholly lost to the plaintiffs and their said partners; to wit, at &c. The plaintiffs then averred, that the said *James Jacque*, contrary to his duty as such agent, had made away with and converted to his own use, and had not paid or accounted for to the plaintiffs and their said partners, divers large sums of money collected and received by him as such agent, amounting in the whole to a large sum, to wit, the sum of 2,000*l.*, which was thereby wholly lost to the plaintiffs and their said partners.—The plaintiffs then averred, that the said *James Jacque*, contrary to his duty as such agent, had neglected and refused to render due and sufficient accounts to the plaintiffs and their partners, of divers large quantities of their goods, sold by him (*Jacque*), and of the prices of other of their goods, which came to his possession as such agent as aforesaid, the value thereof amounting in the whole to a large sum, to wit, the sum of 2,000*l.*; which goods were thereby wholly lost to the plaintiffs and their said partners, to wit, at *London* aforesaid.

The second and third counts varied from the first, in stating the representation made by the defendant to the plaintiffs, as to the character and circumstances of *Jacque*, in more general terms. The fourth contained an averment, that the defendant, at the time he recommended *Jacque* to the plaintiffs as a desirable agent, knew that he was indebted to one *Stewart* in the sum of 800*l.*, and that he (*Jacque*) had no means to pay such sum; and that he, having been employed by the plaintiffs at *Manchester*, as such agent, had failed to account to them. The fifth

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count alleged, that the defendant requested the plaintiffs to employ *Jacque* as their agent; that he was, at the time of such request, labouring under serious pecuniary and other embarrassments, of which it was material that the plaintiffs should have been informed, but which the defendant, although it was his duty to have informed them, wrongfully, deceitfully, wilfully, and fraudulently suppressed, withheld, and concealed from the plaintiffs. There were four other counts, in which the suppression and concealment of the real circumstances of *Jacque* from the plaintiffs, were stated in different terms.

The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last *Trinity* Term, it appeared that the plaintiffs were wholesale grocers and tea dealers in *London*; that, in *December*, 1824, the defendant, a soap manufacturer, being intimate with the plaintiffs, called upon them, and, after asking whether they did any business at *Manchester*, on being answered in the affirmative, said, that he had a young friend for whom he was very anxious to procure a commission in the tea trade, and who had an excellent connection at *Manchester*, and would be a great acquisition to any person who wanted to do business there; that he, the defendant, had made the offer to the plaintiffs before he made any proposals to Messrs. *Smith & Co.* (a respectable house in the city in the same line of business as the plaintiffs), who would jump at the offer; that his friend was so excellent a young man, and of such a good character, that he (the defendant) would rather trust him without security, than most other men with; that the young man had lately done business at *Manchester* for large tea dealers in the city, who could no longer execute his extensive orders; that he had an uncle at *Manchester*, a clergyman of the *Scotch* church, who would afford him very great facilities in the way of business, as he knew all the *Scotch* travellers in the tea trade; that the defendant would like his friend to sell soap for himself

and his partner, but that he feared his other connections would not allow him time to do so. To this the plaintiffs replied, that they had no wish to extend their trade, and that they had an objection to giving commissions, but that, from the very strong recommendation of the defendant, they would think of it. In the beginning of 1825 the defendant introduced the plaintiffs to *James Jacque* as his friend, and they accordingly employed him to do business for them at *Manchester* on commission, and large quantities of tea and coffee were sent there according to his orders, until the middle of 1827, when, after having frequently sent incorrect statements of the amount of receipts on the plaintiffs' behalf, he became a defaulter to the amount of 900*l.*, exclusive of bad debts to a very large extent; and he shortly afterwards took the benefit of the Insolvent Debtors' Act. On the plaintiffs' making inquiries respecting *Jacque*, they found, that, instead of his having been employed in the tea trade at *Manchester*, in 1824, as the defendant had stated, he had, at the recommendation of the defendant, been taken into partnership by a Mr. *Stewart*, a warehouseman in *Watling Street*, in *July*, 1823, and that, in consequence of heavy losses, and a robbery committed on their premises, the partnership was dissolved in *October*, 1824; and that, on closing the accounts, *Jacque* was found to be indebted to Mr. *Stewart* in 800*l.*; and that, in *November*, 1824, he gave a promissory note for the payment of that sum by instalments, at two, three, and four years, but that neither of those instalments had been paid. These facts were well known to the defendant, in whose employ *Jacque* had formerly been, and he also negotiated the terms of the dissolution of the partnership between *Jacque* and *Stewart*. Several letters written by the defendant to *Jacque* after his defalcation at *Manchester* was discovered, were given in evidence, in which the defendant, in order to exculpate himself, advised *Jacque* as to the mode of conduct he should pursue, and

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he requested him to write a penitent letter to his employers (the plaintiffs); a copy of which the defendant sent to him; and he also pressed *Jacque* not to communicate to the plaintiffs the fact of the defendant's knowledge of the previous embarrassments of *Jacque*. The plaintiffs having applied to the defendant on the subject, he expressed his regret that he should have been the means of introducing *Jacque* to them; and that, as he (the defendant) had been the means of their incurring a loss, he would see his partner, and see what could be done for their relief. But no further communication having been made, the plaintiffs commenced this action.

For the defendant, it was insisted, that the plaintiffs could not be entitled to recover, as they had not proved that the defendant had made the representations in question to them with a fraudulent view or intent. But his Lordship told the Jury, that, if they were satisfied that the representations respecting the character of *Jacque* were made by the defendant as alleged in the declaration, and he knew them to be false at the time, the action was maintainable; that, if they believed that the plaintiffs would not have employed *Jacque* but for the representations of the defendant as to his conduct and character, the plaintiffs would be entitled to a verdict for the full amount of the loss they had experienced through the default of *Jacque*; and that, if the defendant had suppressed any facts within his knowledge, with regard to the circumstances of *Jacque*, which he ought to have communicated to the plaintiffs, it was also a ground for an action by them; and his Lordship eventually left it to the Jury to consider, whether the representations made to the plaintiffs by the defendant were false within his own knowledge or not.

The Jury returned a verdict for the defendant.

Mr. Serjeant *Wilde*, in the last term, obtained a rule *nisi*, that this verdict might be set aside and a new trial

had, on the grounds that the verdict was against evidence, and that the defendant was, at all events, liable to the plaintiffs for the consequences of a representation false within his own knowledge, particularly when coupled with a suppression of facts which it was his duty to have disclosed to the plaintiffs on recommending *Jacque* to them as an agent, and the concealment of those facts was equivalent to a fraudulent representation, for, as Mr. Justice *Chambre* said, in *Tapp v. Lee* (a), "Fraud may consist as well in the suppression of what is true, as in the representation of what is false;" and here, the defendant solicited the plaintiffs to take *Jacque* into their employ, to which they assented, on the sole ground of the favourable representation of his character by the defendant, although he well knew that the representation he had made was false, and that, if he had not studiously concealed the circumstances of *Jacque*, the plaintiffs would never have employed him as their agent.

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Mr. Serjeant *Jones* now shewed cause.—The question was left most correctly by the Lord Chief Justice to the Jury, and the defendant is entitled to retain the verdict found for him, and which was fully warranted by the evidence, and there is consequently no ground to disturb the verdict, or to send the cause down to another trial. In order to sustain an action of this nature, it is not enough to shew that the defendant has made an inaccurate or untrue representation, or that he asserted what he does not know, or suppressed facts which were within his knowledge; it must be shewn, either that he acted with a wicked design, or that he had a fraudulent intention, or was induced to make representations in favour of a third party, from interested or pecuniary motives. In other words, there must either be an intent to injure the party

(a) 3 Bos. & Pul. 371.

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to whom the representation is made, or to benefit the person making it. In *Pasley v. Freeman*, Mr. Justice Grose, in delivering a most elaborate judgment, said (a): "It is admitted, that the action is new in point of precedent: but it is insisted that the law recognizes principles on which it may be supported. The principle on which it is contended to lie is, that, wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposition I controvert. If the assertion be a nude assertion, it is that sort of misrepresentation, the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound to do so, and he cannot recover a damage which he has suffered by his own *laches*." And, in the subsequent case of *Haycraft v. Creasy* (b), it was expressly decided, that the foundation of an action of this nature is, fraud and deceit in the defendant, and a damage to the plaintiff in consequence thereof; and Mr. Justice Grose there said (c): "Until some case shall be decided which goes further than that of *Pasley v. Freeman*, there must be evidence of fraud to support such an action, and evidence of being a dupe is not sufficient." If a person assert a *falsehood*, he must know that his assertion is not true; but here the plaintiffs did not shew that the defendant was actuated by any malicious motive, or that he intended to defraud or injure them, or to benefit himself. Although he might have wished to confer a benefit on *Jacque*, and though the latter had been previously unsuccessful in trade, yet the defendant might have believed that he was a fit and proper person to be employed as an agent to sell on commission. The recommendation of *Jacque* to the plaintiffs was in the nature of a guarantie; and as it was made nearly three years before *Jacque* made any default, he ought not to be responsible for his misconduct,

(a) 3 Term Rep. 53, 5.

(b) 2 East, 92.

(c) Id. 106.

the plaintiffs having continued to employ him in the interval. But, as it was not shewn that the defendant acted with a malicious or fraudulent intent, there is no ground to disturb the verdict which the Jury were fully warranted in finding for him.

Mr. Serjeant *Wilde*, (and Mr. Serjeant *Stephen* was with him), in support of the rule, were stopped by the Court.

Lord Chief Justice TINDAL.—Without having this case further discussed, the Court will be better satisfied if it is submitted to the consideration of another Jury. It is therefore better to say but little at present, either as to the nature of the evidence or facts proved at the trial, as it may tend to prejudice the parties when the cause comes on to be re-heard. But I must make one observation as to the law, as far as regards the right of the plaintiffs to maintain this action, as stated by my brother *Jones*, as it is not warranted by nor consistent with any previous adjudication or decision, and no authority has been referred to in support of such a principle. He has insisted that it is not sufficient for a plaintiff, in order to ground an action for deceit against the defendant for misrepresenting or mis-stating the circumstances or character of a third person, to shew that the representation is false within the knowledge of the party making it, and that damage has actually accrued to the person to whom it was made; but that he must also shew that the defendant was actuated by malice, or some interested motive, independently of the facts he has represented as being true. I am not aware of any authority for such a proposition, and it appears to me to be immaterial what the motive might be. The law will infer an improper motive, if a party make an incorrect or wrong statement, if such statement be shewn to be false within his own knowledge, and is proved to have oc-

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casioned a damage or injury to the person to whom it is made. I therefore think that there ought to be a new trial on payment of costs.

Mr. Justice PARK.—I am also of opinion that there ought to be a new trial, for the reasons stated by my Lord Chief Justice. I do not agree with the proposition as stated by my brother *Jones*, particularly as he has referred to no authority in its support. I perfectly remember when the case of *Pasley v. Freeman* was decided; and in *Haycraft v. Creasy*, Mr. Justice Grose, Mr. Justice Lawrence, and Mr. Justice Le Blanc, differed from Lord Kenyon, and we all know the great distress of mind that decision caused him. But my brother *Chambre*, who was one of the most eminent Judges that ever sat in this Court, laid down the law applicable to this species of action in *Tapp v. Lee*, and which I believe has ever since been acted upon and treated as an authority. He there said (a): “It would be an absurdity in law to hold, that if a man draws another into a snare, the party suffering should have no remedy by action. An action on the case for deceit is well known to the law, and I cannot agree in the argument which has been used for the defendant, that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood. As to the case of *Haycraft v. Creasy*, I agree with the majority of the Judges who decided the point of law. In that case there was no fraud, but fraud is the foundation

(a) 3 Bos. & Pul. 371.

of the action. There, the defendant himself was misled—every thing which he stated he believed, the ground of action, therefore, totally failed.”

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Mr. Justice GASELER.—The decisions adverted to appear to me to establish this principle, that, if a party tell an untruth, or misrepresent a fact within his own knowledge, so as to create an injury to the person to whom the communication is made, it is a sufficient ground of action. Here, the defendant voluntarily represented the character of his young friend to the plaintiffs in the strongest possible terms of approbation:—but, as the attention of another Jury is deemed requisite, I abstain from expressing any opinion on the subject.

Mr. Justice BOSANQUET concurred.

Rule absolute for a new trial, on payment of costs.

GREENSLADE v. HALLIDAY.

Monday,
Feb. 8th.

THIS was an action on the case for an alleged injury to the plaintiff's reversionary interest, by the defendant's pulling down and removing a board placed across a stream of water flowing to the defendant's mill, and which board was put up by the plaintiff for the purpose of irrigating his meadow.

The first count of the declaration stated, that, before

The plaintiff claimed a right to pen back the water of a stream running through the defendant's land, for the purpose of irrigating a meadow. The original mode of enjoying this right had, for

fifty years, been by placing loose stones, and occasionally a board, across the stream; but, on a late occasion, the plaintiff's tenant fastened down the board with stakes, and the defendant caused both the board and the stakes to be removed:—*Held*, that he could only justify the removal of the stakes; and the Jury having found a verdict for the plaintiff in an action on the case for an alleged injury to him by the removal of the board, the Court refused to grant a new trial.

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and at the time of committing the grievance by the defendant thereafter mentioned, a certain close of meadow land, with the appurtenances, situate and being in the parish of *Old Cleeve*, in the county of *Somerset*, and near to a certain stream or water-course there, was in the possession or occupation of one *William Hagley* as tenant thereof to the plaintiff (the reversion thereof then and still belonging to the plaintiff), to wit, at &c.; that, long before and until and at the time of the committing the grievance thereafter mentioned, a great part of the water of the said stream or water-course did run and flow, and of right ought to have run and flowed, and still of right ought to run and flow therefrom, under a certain arch, unto, into, and along a certain channel, and thence, unto, into, and over a certain close of the defendant, and from thence, through a hole under the cellar of a certain dwelling-house, unto and into a certain channel, and, from thence, unto and into the said close of meadow land, for the irrigating and watering of the said close, and the benefit and improvement of the soil thereof:—yet, the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in his reversionary estate and interest of and in the said close of meadow land, with the appurtenances, whilst the same was so in the possession and occupation of the said *William Hagley* as tenant thereof to the plaintiff as aforesaid, and whilst the plaintiff was so interested therein as aforesaid, to wit, on the 1st *January*, 1829, at &c., wrongfully and unjustly, without the leave or licence and against the will of the plaintiff, pulled down and removed a certain board before then erected, and then standing and being in and across the said stream or water-course, for the purpose of diverting and turning the said part of the said water there under the said arch, and unto and into and along the said channel and close of the defendant, unto and into the said close of meadow land, for irrigating and

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watering the same, and benefiting and improving the soil thereof as aforesaid, and wrongfully and unjustly kept and continued, and caused to be kept and continued the said board so pulled down and removed as aforesaid, for a long space of time, to wit, from thence hitherto, and thereby, during the time aforesaid, wrongfully and unjustly let down and drew off, and caused to be let down and drawn off, a great part of the water of the said stream or water-course, which, during the time aforesaid, ought to have run and flowed, and otherwise might and would have run and flowed, and hindered and prevented the same from running and flowing under the said arch, unto, into, and along the said channel, and thence, unto, into, and over the said close of the defendant, and through the said hole and channel, unto and into the said close of meadow land, for the purposes aforesaid; and, by means of the several premises aforesaid, the aforesaid close of meadow land, and the soil thereof, had been and were greatly impoverished, deteriorated, and lessened in value, and the plaintiff had been and was thereby greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said close of meadow land, with the appurtenances, so in the possession and occupation of the said *William Hagley*, as tenant thereof to the plaintiff, as aforesaid.

The defendant pleaded the general issue of not guilty.

At the trial, before Mr. Justice *Burrough*, at the last Assizes at *Bridgewater*, it appeared that one *Hagley* rented a farm of the plaintiff, which contained an ancient meadow near a small stream, which flowed through lands belonging to the defendant, a widow lady, who defended this action as guardian to her son; that, for a period of fifty years or more, the plaintiff's tenants, and their predecessors, had used to enter the defendant's land, and pen back the water of the stream by placing a row of loose stones across a certain part of it, and when the water was obstructed or penned back by those stones, a certain portion

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of it ran through a small hole or archway, and then along an artificial channel which was cut at some length over the defendant's land, and thence to the plaintiff's meadow, where it was used for the purpose of irrigating the same. It also appeared, that, in dry seasons, when the loose stones would not pen the water sufficiently high to make it pass to the plaintiff's meadow, his tenants used to place a board or fender across the stream, which was supported by these stones, but neither the board nor stones had been permanently fixed until *January*, 1829, when the plaintiff's tenant placed the board in front of the stones, and fastened it down with two hooked stakes, which he drove into the bed of the stream.

It did not appear whether this board penned the water higher than before; but the defendant considering that the making the dam permanent by the fixing of the board might establish for the plaintiff a greater right to use the water than he before had, and be prejudicial to her enjoyment of a mill above, and of certain meadows below the dam, she ordered the stakes to be pulled up, and the board to be removed and laid on a road-way adjoining the stream, and at the same time told the plaintiff's tenant, that he should not place the board there again until it was ascertained what quantity of water ought to pass to the plaintiff's meadow. On a witness being called to prove that declaration by the defendant, the learned Judge refused to receive it in evidence, and seemed to think that the defendant had denied the plaintiff's right to use the water altogether, and told the Jury, that, if the board penned the water back in an unusual manner, or higher than it ought to have done, the defendant was entitled to pull it down, and that it was immaterial how it was fastened.

The Jury found a verdict for the plaintiff—damages, one shilling.

. Mr. Serjeant *Merewether*, in the last term, obtained

a rule nisi, that this verdict might be set aside, and a new trial had, on the grounds—*first*, that the verdict was against the evidence, and that the Jury ought to have found for the defendant, as the plaintiff had assumed too large a right, by making the dam permanent by the fastening of the board—*secondly*, that the declaration by the defendant at the time the board was removed, was improperly rejected—and *lastly*, that the Jury had been misdirected as to the materiality of the mode by which the board was fastened down.

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Mr. Serjeant *Wilde* now shewed cause.—When the board was fastened down by the plaintiff's tenant, it did not appear that the water was thereby penned back so as to make it rise to a greater height than it did before, nor was there any evidence to shew that the board, when fastened down, was higher than the dam which had been formerly made with the loose stones. The plaintiff proved that for fifty years his tenants or occupiers of the meadow had penned back the water by a dam, and sometimes by a board, without any interruption by the defendant's predecessors. The weight of evidence, therefore, was clearly in favour of the plaintiff, and although the defendant insisted that he had only a qualified right, yet, if the enjoyment of such right were substantially the same after the board was fastened down, a mere variation by making the dam permanent was immaterial. In *Luttrell's* case (a), where a person, having two old fulling mills, to which was annexed, by prescription, a right to a water-course, pulled them down, and erected two mills to grind corn; it was resolved, that, as the mill was the substance, and the addition demonstrated only the quality, and the alteration was not of the substance, but only of the quality, or the name of the mill, without any prejudice in the water-course to the owner, the prescription remained. So, here,

(a) 4 Rep. 86.

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the board was the substance, and the addition of the stakes only demonstrated the quality, but did not alter the substance; and it was not shewn that the defendant was prejudiced, or sustained any injury by the mere act of fastening the board; and, although she might have ordered the stakes to be taken up, she had no right to direct the board to be removed, which was an excess of power which the law will not justify. In *Comyns's Digest*, it is said (a): "A circumstantial variation in a thing, to which a prescription is annexed, does not destroy the prescription;" and *Hobart* (b) is referred to in support of that position. In *Saunders v. Newman* (c), where the occupier of a mill erected a wheel of different dimensions from the former one, but which required less water, Mr. Justice *Bayley* said: "I do not see how the alteration of the wheel can make any difference;" and Mr. Justice *Abbott* said: "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill, in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; but here, the alteration is by no means injurious, for the old wheel drew more water than the new one." So in this case, as the defendant did not prove that the board was higher when fastened than it was before, the mere alteration, by rendering the dam permanent, could not affect the defendant; and she did not shew that her right had been prejudiced, but merely conceived that the plaintiff's right would be extended, and she did not deny the existence of his right. In *Williams v. Morland* (d) it was decided, that flowing water is *publici juris*, and that an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose; and, therefore,

(a) Tit. "Prescription," (G).

(b) Page 39.

(c) 1 Barn. & Ald. 258.

(d) 2 Barn. & Cress. 910; S. C. 4 Dow. & Ryl. 583.

that the plaintiff could not recover damages for the mere erection of a dam by the defendant;—but that the plaintiff was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water. Although in *Francis v. Drake* (a), which was an action on the case for breaking down and destroying an old weir and erecting another in its stead; it appeared that the owner had converted it from wood to stone; and the Court of *King's Bench* held, that he had a right to do so, if he did not make it higher, or so construct it as to affect a collateral right, *vis.* to prevent salmon from leaping over it, on going up the river to spawn. Here, however, there was no alteration in the dam, the board was of the same dimensions as those formerly used, it was merely secured by a different mode; and the declaration by the defendant to the plaintiff's tenant, that he should exercise no right there, was properly excluded; and, although the defendant might have pulled up the stakes, she certainly was not justified in ordering the board to be removed.

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Mr. Serjeant *Merewether*, in support of his rule.—The defendant did not dispute the plaintiff's right to the water as he had before enjoyed it, but it was most material for her to support her own interests, and, as the fastening the board down with stakes gave a degree of permanency to the dam, which had previously been only occasional, the defendant was fully justified in removing it; and if the verdict found for the plaintiff be allowed to stand, it will establish his right to fix the board with stakes; but as they had never been before used, and were driven into the defendant's land, the plaintiff was clearly a trespasser.

[Lord Chief Justice *Tindal*.—If the plaintiff had brought trespass against the defendant for removing the dam, and she had pleaded, by way of justification, that she had removed the stakes which were unlawfully driven into her

(a) Not reported.

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land, might not the plaintiff have newly assigned that the defendant had removed the board also?]

The dam was not a permanent dam before the board was fastened down; and as it might have been carried away by the stream when the defendant ordered the stakes to be pulled up, the plaintiff received no injury by its removal. The mode in which the board was fixed was most material, especially as it had never been fastened before; and the defendant's declaration to the tenant, at the time of the removal, ought to have been received in evidence. She did not deny the plaintiff's right to the water altogether, but merely disputed its extent; and the Jury might have been led to believe that she had ordered that he should not exercise any right in future, or that she had denied his right to any part of the water; whereas it was only a qualified or limited interdiction, made in consequence of the plaintiff's converting a dam which had been only used occasionally, to a fixed and permanent dam.

Lord Chief Justice TINDAL.—We do not think that there has been such a misdirection in this case, as to induce us to grant a new trial, without payment of costs. The only question is, whether the defendant has not done more than she was justified in doing, in causing the stakes to be pulled up, and the board to be removed? I do not see my way with sufficient clearness, to say that the verdict for the plaintiff ought to be set aside. The evidence that was rejected is not of sufficient importance, in itself, to authorize such a step; for, if it had been admitted, the Jury would have acted rightly in coming to the conclusion they did. But, from the evidence before us, and on which this case must be decided, I am clearly of opinion, that the defendant has done more than she was by law authorized to do. The board in dispute had been placed across the stream by the plaintiff, long before its removal, and it had been lately fastened down by his ten-

ant, by two stakes. Admitting that this was a new mode of fixing the board, yet the defendant, instead of removing the stakes, removed the board also, and laid it on a road-way. If a party who has a right to erect and raise a stone weir, erects buttresses thereto; although they might be an encroachment on the land of another, which would justify him in pulling them down, yet he would have no right to pull down or demolish the weir also.

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The rest of the Court concurring—

Rule discharged.

WEST v. TAUNTON.

Tuesday,
Feb. 9th.

THIS was an action of trover, and brought to recover from the defendant, a *Bow-street* officer, certain bank-notes and sovereigns, and a watch-seal, which the defendant had taken from the plaintiff, under the following circumstances:—The sum of 3,000*l.*, the property of the Commissioners of his Majesty's Customs, had been procured, by means of a forged check, from the Receiver General of the Customs. The plaintiff and two other persons were apprehended, and tried at the *Old Bailey* for the forgery; one was executed, another transported for life, but the plaintiff was acquitted. The property sought to be recovered was found in the possession of the plaintiff at the time he was taken into custody by the defendant; and he believing the money to be part of the proceeds of the forged check, and as the impression on a sealed letter

In trover for bank-notes, sovereigns, and a watch-seal, the defendant entered an appearance, and filed a plea as follows:—And the said defendant, by *J. G. W.*, who has been duly appointed solicitor on behalf of his Majesty, under the directions of the commissioners of his Majesty's customs, and who acts as such solicitor under such directions, in this behalf, comes and defends the wrong and injury, when &c. The plaintiff treated this plea as a nullity, and signed judgment. The Court set the judgment aside, on the ground, that the plea sufficiently disclosed that the person defending as attorney was acting in matters concerning the revenue, and within the statutory exemption of 9 *Geo. 4*, c. 25.

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found in the possession of one of the other parties corresponded with the seal worn by the plaintiff, the defendant seized that also.

The entry of the defendant's appearance in the filacer's book was as follows:—

“Middlesex—Samuel Hercules Taunton, ats. William Joseph West; cap. returnable fifteen days of St. Martin.

J. G. Walford.”

A declaration having been delivered to Mr. *Walford*, with notice for the defendant to plead within the usual time, the following plea was filed in the Prothonotaries' office:—

“And the said Samuel Hercules Taunton, by Joseph Green Walford, who has been duly appointed solicitor on behalf of his Majesty, under the directions of the Commissioners of his Majesty's Customs, and who acts as such solicitor, under such directions, in this behalf, comes and defends the wrong and injury, when &c., and says, that he is not guilty of the said supposed grievances above laid to his charge, in manner and form as the said William Joseph West hath above thereof complained against him. And of this, he, the said Samuel Hercules Taunton puts himself upon the country,” &c.

The plaintiff treated this plea as a nullity, and signed judgment, and assigned as a reason for his so doing, that the defendant had neither appeared personally, nor by an attorney of this Court duly appointed by him, but by the solicitor of his Majesty's Customs, who had no authority to act as a solicitor or attorney, except in revenue matters, pursuant to his appointment by the statute 9 *Geo.* 4, c. 25; and that it did not appear that any matters concerning the revenue were in question in this suit.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* that the judgment might be set aside, and that, upon payment of the costs of the action up to the time of signing judgment, and the costs of this application to the Court, and the delivery up of the watch-seal to the plaintiff, all further proceedings might be stayed;—or, if the plaintiff would not accept the seal, that so much of the declaration as related to the said seal might be struck out. The learned Serjeant produced an affidavit made by the defendant, that he had no interest whatever in the cause, and that he was indemnified in defending this action by the Commissioners of his Majesty's customs, he having seized the property in question in his capacity of a police officer, and which he had delivered over to an officer of the crown; and that he fully believed the bank-notes and sovereigns found in the plaintiff's possession, were the proceeds of the forged check obtained from the Receiver-general of the customs.—Mr. *Walford* also deposed, that he had been duly appointed solicitor on behalf of his Majesty, under the directions of the Commissioners of his Majesty's customs.

Mr. Serjeant *Taddy* now shewed cause.—The only question in this case arises on the construction of the statute 9 *Geo.* 4, c. 25, which authorizes the appointment of persons to act as solicitors on behalf of his Majesty, in any Court or jurisdiction, in revenue matters; and after reciting, 'that it had been found greatly conducive to the public interest, that persons specially appointed by the Commissioners of the treasury, or by the several Commissioners of his Majesty's revenue, to be solicitors or attorneys on behalf of his Majesty, should act and practise as such solicitors or attorneys, without being admitted and enrolled as solicitors or attorneys, and without being subject, by reason of such acting or practising, to any of the regulations in force in any part of the United Kingdom relating to solicitors or attorneys,' it enacts

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“That, whenever any person has been appointed to be solicitor or attorney on behalf of his Majesty, under the orders of the Commissioners of the treasury, customs, &c., &c., it shall and may be lawful for such person to act and practise as such solicitor or attorney, under such orders, in all Courts and jurisdictions in the United Kingdom.” At law, a defendant must either appear personally, or by an attorney of the Court, who acts on his retainer, and over whom the Court has jurisdiction; and although the solicitor of the customs is appointed to act on behalf of his Majesty, under the statute 9 *Geo.* 4, yet it is not competent to him to appear and file a plea for a defendant, without stating that he acts on his behalf; for he has only authority so to do when the cause or matter in dispute concerns revenue matters, of which the Court should be apprized, either by affidavit, or by a suggestion on the record. Although the Lord Mayor of *London* constitutes the chief Prothonotary of this Court his attorney, to prosecute and defend the rights and privileges of the city, yet the Lord Mayor comes personally into Court, and nominates the Prothonotary as his attorney, and his name is immediately recorded. But Mr. *Walford* is not an attorney of the Court, and there is nothing to shew that he has authority to act for the defendant, or that he defends the action on behalf of his Majesty, or that the interests of the revenue are concerned.

Mr. Serjeant *Wilde*, in support of his rule.—In the late case of *Rowe v. Brenton*(a), the Court of *King's Bench* granted a trial at bar, upon the mere suggestion of the Attorney-General, that the crown was interested in the result of the cause, although there was nothing to shew, on the face of the record, that any such interest existed. But here it is alleged in the plea, that Mr. *Walford* has been duly appointed solicitor on behalf of his Majesty,

(a) 8 Barn. & Cress. 737; S. C. 3 Man. & Ryl. 133.

under the directions of the Commissioners of the customs, and that he acts as such solicitor; which is a sufficient intimation of his authority to the Court. At all events, the plaintiff should either have demurred, or applied to set aside the plea, and not have treated it as a nullity, and signed judgment.

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Lord Chief Justice TINDAL.—I feel no doubt whatever as to the authority of Mr. *Walford* to appear as the attorney for the defendant in this cause; and that authority sufficiently appears upon the face of the plea, and is properly stated. At common law, and previously to the statute of *Westminster* the second (*a*), no parties to a suit were permitted to appear by attorney without the King's special warrant; but now, by that statute, a general liberty is given to parties to appear and defend by attorney. The practice being thus established, the number of persons who assumed to act as attorneys was found to be highly inconvenient; and, from the time of *James* the First (*b*) to *George* the Second (*c*), various acts of Parliament were passed for the regulation of attorneys, and to limit their number, and by which certain modes of qualification were prescribed previously to their admission, and a penalty enforced on persons practising without having been duly admitted; and the object of the statute 9 *Geo.* 4, c. 25, was, to exempt from those penalties persons who had not been duly admitted and enrolled as solicitors or attorneys, but who had been specially appointed to act as such, on behalf of his Majesty. The first section expressly enacts, that, "whenever any person has been, or is, or shall be appointed to be solicitor or attorney on behalf of his Majesty, under the orders and directions of the Commissioners of the treasury, customs, excise, or stamps,

a. 13 *Edw.* 1, c. 10.

b. 3 *Jac.* 1, c. 7.

(*c*) 2 *Geo.* 2, c. 23, made perpetual by 30 *Geo.* 2, c. 19.

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or under the orders and directions of any Commissioners, or other person or persons having the management of any other branch of his Majesty's revenue, for the time being, it is and shall and may be lawful for such person to act and practise as such solicitor or attorney, under such orders and directions, in all and every Court and Courts, jurisdiction and jurisdictions, place and places, in any and every part of the United Kingdom; any thing in any act of Parliament, or in any order or rule of any Court of Justice, or any law, usage, or custom, in force in any part of the United Kingdom relating to solicitors or attorneys, or to the admission or practice of such solicitors or attorneys, to the contrary in anywise notwithstanding;" and the second section enacts, "that every person who shall or may have acted as such solicitor or attorney under or in pursuance of, or in obedience to, any such appointment, orders, and directions, shall be and is hereby respectively indemnified for and on account of the same, and of any act or thing done in pursuance of, or in obedience to, or in conformity with, such appointment, orders, and directions; and if any action, suit, prosecution, or proceeding, hath been, or shall be commenced against any person, for or in respect of any act, matter, or thing done under such appointment, orders, or directions as aforesaid, it shall be lawful for the defendant or defender in any such action, suit, prosecution, or proceeding, in or before whatever Court the same may be commenced or had, to apply to such Court, by motion in a summary way, to stay all proceedings whatever against such defendant or defender, and such Court is hereby required to make order for that purpose accordingly." Here, the words used in the plea sufficiently disclose to the Court that Mr. *Walford* has been duly appointed solicitor of his Majesty's customs, and that he acts as such:—they not only point out his character, but bring him within the exception in the 9 *Geo.* 4; and he is also authorized to act as an attorney for the Commissioners by whom he was appointed.

The plaintiff, therefore, should not have treated the plea as a nullity: but he will not be concluded by this decision, for he may sue for the penalty imposed by the statute 2 Geo. 2, c. 23, s. 24, if Mr. *Walford* be not legally authorized to act as the attorney for the defendant.

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Mr. Justice PARK.—I am of the same opinion. The object of the statute 9 Geo. 4, was to have persons of superior rank and character to act as attorneys or solicitors on behalf of his Majesty, and to exempt such persons from the penalties which attach to those who practise as attorneys without having served a regular clerkship, or been duly admitted. Although, before the statute of *Westminster* the second was passed, a party could not sue or defend by attorney, but the defendant himself delivered his plea in Court, yet he may now appear and plead by an attorney who is authorized to act for him as such. Although it has been said, that one who acts as an attorney should be subject to the jurisdiction of the Court of which he is an officer, still I am not prepared to say, that a person who fills the situation and acts in the character of solicitor to the customs, would not be equally amenable to the Court for misconduct, as a person duly qualified to act as an attorney. I have no doubt but that the plea was properly put in and filed, and that Mr. *Walford* acted under the directions of the Commissioners of the customs.

Mr. Justice GASELEE.—Mr. *Walford* no doubt considered himself fully qualified to act as attorney for the defendant, and I think he need not have made any application to the Court previously to the filing of the plea. It clearly appears from the proceedings, as stated in the defendant's affidavit, that the matter at issue between the parties concerns the revenue, as a forgery had been committed, by which a large sum had been obtained from the Receiver-general of the customs, and the defendant was set

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in motion by the Commissioners, who took the plaintiff into custody, and found bank-notes and money in his possession, which he believed to be the produce of the forged check; and it also appears by Mr. *Walford's* affidavit, that he had been duly appointed solicitor to the customs, and he was clearly authorized to act in that character.

Mr. Justice BOSANQUET.—Generally speaking, a defendant can only appear and defend by an attorney duly qualified and admitted by the Court; but, in matters concerning the revenue, persons who have been appointed solicitors or attornies on behalf of his Majesty, are authorized to act as such by virtue of the statute 9 *Geo. 4*, and this case certainly embraces a matter connected with the revenue. Mr. *Walford* did not constitute himself an attorney, and he has sworn that he had been duly appointed solicitor to the customs. The defendant, by his appearance, adopted him as his attorney, and authorized him to act in his behalf; and the statute does not confine the privilege to cases in which the Crown is a party or concerned, but extends to all matters affecting the revenue. The rule, therefore, must be made absolute.

The Court, after referring to the cases of *Pickering v. Truste* (a), *Brunsdon v. Austin* (b), *Tucker v. Wright* (c), and *Earle v. Holderness* (d), ordered, that, upon the defendant's delivering up the seal to the plaintiff, according to the terms of the rule, it should be made—

Absolute.

(a) 7 Term Rep. 53.

Bing. 601.

(b) Tidd's Prac. 9th edit. Vol. 1, p. 545.

(d) 1 Moore & Payne, 254; S. C. 4 Bing. 462.

(c) 11 B. Moore, 500; S. C. 3

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SHARPE and Another, Assignees of HARRISON, an Insolvent Debtor, v. THOMAS.

*Tuesday,
Feb. 9th.*

THIS was an action of *assumpsit* for money had and received, and brought by the plaintiffs, as assignees of one *Harrison*, an insolvent debtor, against the defendant, to recover a sum of money which he had become possessed of under the following circumstances. On the 5th of *January*, 1827, *Harrison*, being in embarrassed circumstances, called a meeting of his creditors at *Southampton*, and proposed to execute a deed of assignment of all his property, to trustees, in trust, to pay all his creditors ten shillings in the pound; and he instructed his attorney to prepare the deed accordingly. On the same night he went to *London*, for the purpose of obtaining the consent of some of his creditors there, and on the 8th of *January* he executed a warrant of attorney to the defendant, his brother-in-law, to secure him 700*l.* and interest, at the rate of 5*l.* per cent., and the defendant was to be at liberty to enter up judgment forthwith, or at any time thereafter, and to sue out execution for the above sum and interest due thereon. The defendant entered up judgment on the 12th of *January*, and sued out a writ of *fiert facias* thereon on the 15th, which was executed on the 16th, and on the 22nd the whole of *Harrison's* goods and stock in trade were valued and appraised to the defendant at the sum of 395*l.* 12*s.* The other creditors of *Harrison* obtained nothing; and, one of them having arrested him on the 7th of *February*, he went to prison on the 8th, on the 14th he petitioned the Court for the relief of Insolvent Debtors, and on the 22nd *March* was discharged by order of that Court, under the statute 7 *Geo.* 4, c. 57.

A warrant of attorney executed by a trader to one of his creditors, authorizing him to enter up judgment and sue out execution forthwith, and he did so four days after the instrument was executed, and the Jury found that, when it was given, the defendant meant to take the benefit of the Insolvent Debtors' act:—*Held*, to be a charge upon, or assignment of the estate and effects of the insolvent, within the 32nd section of the statute 7 *Geo.* 4, c. 57, and void as against the assignees of the insolvent.

At the trial, before Lord Chief Justice *Tindal*, at the last Assizes at *Winchester*, his Lordship told the Jury, that, if the warrant of attorney was executed by *Harrison*,

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with a view to his taking the benefit of the Insolvent Debtors' Act, it was void as against the plaintiffs as his assignees; and they found that the instrument was executed with such an intent, and accordingly returned a verdict for the plaintiffs.

Mr. Serjeant *Merewether*, in the last term, obtained a rule *nisi*, that this verdict might be set aside, and a non-suit entered, on the ground that the warrant of attorney executed by *Harrison*, and given to the defendant, was not a transfer, charge, delivery, or making over of the insolvent's estate or effects, within the terms or meaning of the 32nd section of the statute 7 *Geo.* 4, c. 57 (a). The 33rd and 34th sections relate expressly to warrants of attorney, and the word *charge* in the 32nd section is the only word that can apply to instruments of that nature, as 'a security for money' can only apply to an existing security, and available at the time of the transfer or delivery. A warrant of attorney passes no immediate interest, it merely authorizes the party to whom it is given to sign

(a) By which it is enacted, "That, if any prisoner who shall file his petition for his discharge under that act, shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, *charge*, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, *charge*, delivery, and making over, shall be deemed, and was thereby

declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner, appointed under that act:—Provided always, that no such conveyance, assignment, transfer, charge, or delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under that act."

judgment, and, until that is done, it is no charge. In *Holbird v. Anderson* (a), where *A.*, being indebted to *B.* and *C.*, after being sued to judgment and execution by *B.*, went to *C.* and voluntarily gave him a warrant of attorney to confess judgment, upon which judgment was immediately entered up, and execution levied on the same day on which *B.* would have been entitled to execution, and had threatened to sue it out—it was held, that the preference so given by *A.* to *C.* was neither unlawful nor fraudulent, within the meaning of the statute 13 *Elizabeth*, c. 5. In *Doe d. Mitchinson v. Carter*, Lord *Kenyon* said (b), “A judgment signed under a warrant of attorney is merely to shorten the process, and to lessen the expense of the proceedings.” There a lessee, who had covenanted not to let, assign, transfer, make over, or otherwise part with an indenture, with a proviso that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold, it was held to be no forfeiture of the lease. Although in *Heapy v. Parris*, Lord *Kenyon* said (c), “A judgment debt is a debt of a superior nature, and, when docketed, is to be paid before simple contract debts:” yet the judgment must be entered up and docketed before it can be a charge upon the estate of the debtor.

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Mr. Serjeant *Wilde*, and Mr. Serjeant *Bompas*, now shewed cause.—It is immaterial to consider whether the warrant of attorney falls within the meaning of the 32nd section of the statute 7 *Geo.* 4, c. 57, for any collusive concert or arrangement to defeat the object of that act renders the transaction altogether void, and neither party can avail himself of it. If a trader fraudulently transfer or deliver any part of his property to a creditor in contem-

(a) 5 Term Rep. 235.

(b) 8 Term Rep. 61.

(c) 6 Term Rep. 369.

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plation of bankruptcy, such transfer is wholly void, and the property vests in the assignees. The object of the Legislature in passing the Insolvent Debtors' Act as well as the acts relative to bankrupts, was, that the property of the insolvent or bankrupt should be fairly and equally distributed among his creditors at large; and here, the Jury have found in terms that the warrant of attorney was given by *Harrison*, in contemplation of his taking the benefit of the Insolvent Debtors' Act. That was, in legal effect, a voluntary or fraudulent preference of a particular creditor, to the detriment of the creditors at large. But a warrant of attorney is a *security for money* within the meaning of the 32nd section of the act; and all provisions in a statute which are meant to guard against fraud, must receive a large and liberal construction. In *Miles v. Rawlyns* (a), where a warrant of attorney was given for a certain sum, with a defeasance, to be void on payment of certain bills accepted for a bankrupt, Lord *Ellenborough* said, that the warrant of attorney appeared to him to constitute a *debitum in præsentis*, sufficient to support the commission; and here, as the warrant of attorney was given voluntarily by *Harrison*, he being insolvent at the time, and intending to take the benefit of the act, it was a charge on his estate and effects, and was, consequently, fraudulent and void as against the provisional and ultimate assignees. If a party, being in insolvent circumstances, voluntarily deliver a security for money to a creditor, it is within the mischief of the act. So is a charge upon his estate, or a transfer of his goods or effects. Although, in *Doe d. Mitchinson v. Carter*, where a lessee who covenanted not to assign an indenture, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold, it was held to be no forfeiture of the lease; yet, when that case afterwards came before the

(a) 4 Esp. Rep. 196.

Court (a), and it appeared that the warrant of attorney was executed and given to a creditor for the express purpose of enabling him to take the lease in execution, the Court held this to be in fraud of the covenant, and that the landlord might recover the premises in ejectment from a purchaser under the Sheriff's sale; and Mr. Justice Grose said: "No man can avail himself of his own fraud to avoid the law." Although in *Thompson v. Freeman* (b), where the defendant, upon joining with a bankrupt as surety in two bonds, received a counter bond of indemnity, and, previously to the bankruptcy, before the two bonds became due, received from the bankrupt a warrant of attorney to confess judgment, and took possession of goods under it, the Court held, that he was entitled to retain them against the assignees, although the two bonds were not discharged by him till after the execution, nor had the obligees then threatened to resort to him for payment: yet Lord Mansfield said: "A bankrupt, when in contemplation of his bankruptcy, cannot, by his voluntary act, favour any one creditor;" and here, there can be no doubt but that *Harrison* voluntarily gave the warrant of attorney to the defendant, and that he contemplated petitioning the Insolvent Debtors' Court at the time. The case of *Holbird v. Anderson* does not apply to the present, as there was no fraud, and the creditor was preferred by his debtor, not with a view of any benefit to the latter, but merely to secure a joint debt to the former, without any intention of bankruptcy or insolvency. That, therefore, was not a fraudulent preference, nor made to defeat the provisions of a statute, the object of which is to guard against fraud, and protect the creditors at large of a party whose estate has become subject to the jurisdiction of the Insolvent Debtors' Court, and which is vested in the assignees of the insolvent from the time of filing his petition to the Court.

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(a) 8 Term Rep. 300.

(b) 1 Term Rep. 155.

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Mr. Serjeant *Merewether*, in support of his rule.—Although a party voluntarily execute a warrant of attorney, and in favour of the creditor to whom it is given, it does not render the instrument void at law. In *Holbird v. Anderson*, Lord *Kenyon* drew a distinction between a warrant of attorney given on a good consideration, and where it is merely colourable, and said, that the words of the statute 13 *Elizabeth*, by which all fraudulent gifts and conveyances to the intent to delay or defraud creditors, are declared to be void, do not apply to a case where a warrant of attorney is given on a good consideration. An instrument of that nature confers no new right on the party to whom it is given. He might act without it, and Lord *Kenyon* said, in *Doe v. Carter*, “I adopt the distinction between those acts that a party does voluntarily, and those that pass *in invitum*; judgments in contemplation of law always pass *in invitum*; and I see no difference between a judgment that is obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney.” If a creditor call on his debtor for payment of a debt due, and he give a warrant of attorney to confess judgment, it is no fraud, it only amounts to an acquiescence on his part that the debt is due and the demand just. But the Legislature have not considered the voluntary act of giving a warrant of attorney to a creditor to be a fraudulent transfer or delivery within the 32nd section of the statute 7 *Geo.* 4, as it could only operate or take effect when final judgment had been signed and execution issued thereon. The statute 3 *Geo.* 4, c. 39, which was passed for preventing frauds upon creditors by secret warrants of attorney to confess judgments, is extended to the provisions of the statute 7 *Geo.* 4, c. 57; for, the 33rd section enacts, that the act of 3 *Geo.* 4, shall extend to the provisional or other assignees of insolvents, who shall, after the expiration of twenty-one days next after their execution of such warrant of attorney, apply by petition

to the Insolvent Court for their discharge, according to the provisions of that act. So, the 34th section provides, that a warrant of attorney is not to be acted upon, or made available against the goods of an insolvent, after his imprisonment. The Legislature has always considered that warrants of attorney differ from other securities for the payment of money; and their validity is expressly recognised by the 7 Geo. 4, but under certain restrictions. Here, the warrant of attorney was not given with a fraudulent view or intent, as in *Doe v. Carter*, and it was not void *per se*. In *Lee v. Thurston*, Lord Chief Justice *Abbott* drew a distinction between a *cognovit* and a warrant of attorney, and said (a), "A warrant to confess a judgment is a very different thing from the act of confessing. A warrant of attorney is only an authority to sign judgment, but a *cognovit* amounts to an actual confession: a warrant to acknowledge is not the same thing as an actual acknowledgment." Although, in *Miles v. Rawlins*, Lord *Ellenborough* is reported to have said, that a warrant of attorney constituted a *debitum in præsentis*, yet it only had reference to a petitioning creditor's debt, on which a commission of bankruptcy might be supported. "The transfer, charge, or delivery of any security for money," in the 32nd section of the 7 Geo. 4, cannot apply to a warrant of attorney; for, such security must be of a pecuniary nature, and capable of being acted upon immediately; namely, a valid and existing security in the hands of the insolvent at the time it was given; and here, as the warrant of attorney was merely given to confess a judgment, the defendant could not avail himself of it until judgment was signed. Neither did it constitute "a charge" on the debtor's estate and effects, until execution had been issued on the judgment. In *Wilson v. Whitaker* (b), Lord Chief Justice *Abbott* doubted whether the statute

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(a) 1 Chit. Rep. 269.

(b) 1 Mood & Malk. 9.

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3 *Geo. 4*, c. 39, extended to cases where no act of bankruptcy had been committed at the time of giving a warrant of attorney; and here, when the instrument was executed by *Harrison*, he did not inform the defendant that he had any intention of taking the benefit of the Insolvent Debtors' Act, and he did not go to prison until a month afterwards.

Lord Chief Justice TINDAL.—The statute 7 *Geo. 4*, c. 57, was passed expressly for the prevention of fraud by persons, who, being in insolvent circumstances, might apply for relief under it; and every clause which has that object in view ought to receive a large and liberal construction. The only question, therefore, in this case is, whether a warrant of attorney given by a party on the eve of his insolvency, to a creditor, authorizing him to enter up a judgment forthwith, and which the creditor caused to be done four days after the execution of the instrument, and then sued out execution, and within one week had the whole of the insolvent's goods appraised to him to the injury or detriment of the creditors at large, does not fall within the words of the 32nd section, which enacts, "That, if any prisoner who shall file his petition for his discharge, shall, before his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, *charge*, deliver, or make over, any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor, every such conveyance, assignment, transfer, *charge*, delivery, and making over, shall be deemed fraudulent and void, as against the assignees of such prisoner, appointed under the act. The question, then, is, whether a warrant of attorney can be considered as a *charge*, within the words of that clause. If taken abstractedly, and by itself, perhaps it could not; but where two parties collude together, for the purpose of defeating one of the main objects of the statute, it ought not to avail them; and the Court are authorized in looking at the intent of the

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parties at the time the instrument was executed. Now, I am of opinion, from the facts disclosed to us, that this warrant of attorney constituted *a charge* upon the estate and effects of the insolvent, and that the parties intended it so to operate at the time it was executed. The case of *Doe d. Mitchinson v. Carter* appears to me to bear very strongly against the defendant; because, when it came before the Court a second time, and it was ascertained that the warrant of attorney was executed for the express purpose of getting possession of a lease, which was not otherwise to be obtained, because it was in the teeth of a covenant directly to the contrary—it was held, that the parties could not avail themselves of their own fraud to avoid the law; the object of the transaction being to enable a tenant to convey his term to a creditor, in direct contravention of a covenant in his lease. There can be no doubt but that the debtor in this case meant to favour a particular creditor, to the exclusion of the creditors at large; and the only difficulty I felt in the course of the argument was, upon the 33rd and 34th clauses of the act, which relate specifically to warrants of attorney. But it seems to me that these sections do not apply to fraudulent contracts, but only to warrants of attorney given *bonâ fide*; and although a party executing such an instrument may act honestly at the time, yet the Legislature have declared it to be fraudulent and void, unless it be filed twenty-one days before the prisoner applies by petition to the Insolvent Debtors' Court for his discharge, and be executed before his imprisonment; thereby extending the provisions of the statute 3 Geo. 4, c. 39, to the assignees of insolvent debtors, which act was passed for the purpose of preventing frauds upon creditors, by the execution of secret warrants of attorney to confess judgment. I am therefore of opinion, that the warrant of attorney in this case, being voluntarily given by a party in insolvent circumstances, to a creditor, it was a charge on the estate of the former, within the

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32nd section of the statute 7 *Geo.* 4, and, consequently, that this rule must be discharged.

Mr. Justice PARK.—The distinction taken by my Lord Chief Justice between fraudulent warrants of attorney, and those which are executed *bond fide*, and are recognised by the statute as valid securities, subject to certain restrictions, is a sound and true distinction; and the verdict of the Jury has relieved us from all difficulty, as they found that the warrant of attorney was executed by *Harrison*, and given to the defendant with an intention by the former of taking the benefit of the Insolvent Debtors' Act. In *Doe d. Mitchinson v. Carter*, the lessee gave a warrant of attorney to enable his creditor to get possession of a lease, although there was an express covenant with the lessor not to assign, transfer, make over, or *otherwise part with* the indenture, and the Court held the warrant of attorney to be void; and here, the Jury have found in terms that the warrant of attorney was given to the defendant by his debtor with the intention of his petitioning the Insolvent Court for his discharge, which in point of law is equivalent to an intent to defraud the rest of his creditors, and deprive them of their just rights. This case, therefore, appears to me to fall within the reasoning of Mr. Justice *Lawrence*, in *Doe v. Carter*, where he said (a): “The defendant says, that this was a proceeding against the tenant *in invitum*. But how can it be considered to be *in invitum*, when it is stated that the warrant of attorney was executed for the express purpose of getting possession of the lease, which could not otherwise be obtained, and that the tenant concurred in that intention? The parties were aware that this lease could not be directly assigned by the lessee in satisfaction of his debt, and therefore they agreed to do that by the appearance of an

(a) 8 Term Rep. 302.

adverse judgment, which by their own act they could not effect, so that it was to appear to be done *in invitum*, when in truth it was done voluntarily." So, here, the defendant could not have obtained the possession of the insolvent's effects but by means of the warrant of attorney, which was given by him with a view to defeat the rights of his creditors at large: I am therefore of opinion, that it was a *charge* on the estate of the insolvent, within the meaning of the 32nd section of the act, and that the 33rd and 34th clauses do not apply, as they only relate to *bond fide* warrants of attorney, executed without collusion or fraud.

Mr. Justice GASELEE.—Upon the authority of *Doe d. Mitchinson v. Carter*, I entertain no doubt whatever but that this warrant of attorney was a *charge* on the estate of the insolvent, within the meaning of the 32nd section of the statute 7 Geo. 4, c. 57. I perfectly recollect the circumstances of that case. At the first trial it only appeared that a creditor of the lessee had taken a warrant of attorney from him for a just debt, upon which judgment was entered up and execution issued, and the lease sold under it. But, on a second trial, it appearing that the warrant of attorney was executed for the purpose of enabling the creditor to get possession of the lease in fraud of a covenant therein contained, the Court most properly held, that the warrant of attorney was void, and afforded no protection to the purchaser of the lease under the sale by the Sheriff. So, here, the defendant was to be at liberty to enter up judgment, and issue execution *forthwith*, and he caused judgment to be entered up within four days, and execution to be sued out three days afterwards. By the judgment and execution, an actual charge was created on the estate of the debtor, who was in insolvent circumstances at the time he executed the warrant of attorney; and, as he did so voluntarily, and in collusion with one of his credi-

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tors, to the detriment of the rest, I think the case falls within the 32nd section of the act, and that the 33rd and 34th do not apply, as they relate only to *bond fide* warrants of attorney, which, however meritorious, are to be deemed void, unless filed twenty-one days before the prisoner presents his petition to the Insolvent Debtors' Court for his discharge.

Mr. Justice BOSANQUET.—I am also of opinion that this rule ought to be discharged. The main and express object of the statute 7 Geo. 4 was, to secure an equal distribution of the estate and effects of an insolvent among all his creditors, and the act ought to receive such a construction as will give full effect to that object. Here, the Jury have found that the warrant of attorney was given by the debtor with a view of his petitioning the Insolvent Debtors' Court for his discharge under the act, and, according to that finding, his object must have been to give a voluntary preference to a particular creditor. Besides, the instrument was executed on the 8th of *January*, judgment was entered up on the 12th, the defendant being at liberty to do so forthwith, and execution was issued on the 15th, and the whole of *Harrison's* goods and stock in trade were appraised to the defendant on the 22nd. It appears, therefore, to me, that it was clearly the object of the debtor, being in insolvent circumstances, voluntarily to favour one of his creditors to the exclusion of the rest; and when the judgment was entered up and execution sued out, it was a charge on the estate of the insolvent; and when his stock and goods were valued and appraised to the defendant, it was *an assignment* of his property within the meaning of the statute; and, as the Jury have found in terms that the transaction was fraudulent, the principle established in *Doe v. Carter* appears to me to apply. This rule, therefore, must be—

Discharged.

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Tuesday,
Feb. 9th.

COOK v. WARD.

THIS was an action for a libel, published in a newspaper called the *Colchester Gazette*. The declaration, after the usual inducement, that the plaintiff was a good and faithful subject of this realm, and was always respected and esteemed by and amongst all his neighbours, and other good, worthy, and estimable subjects of this realm, at *Chelmsford*, in the county of *Essex*;—stated, that, before the committing of the several grievances by the defendant, as thereafter mentioned, one *William Corder*, who had been theretofore tried and convicted of murder, at *Bury*, to wit, at *Chelmsford* aforesaid, was about to be hanged for such crime, to wit, at *Chelmsford*. Nevertheless, the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously intending to injure the plaintiff in his good name, fame, credit, respectability, and reputation, and to bring him into public scandal, infamy, ridicule, contempt, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm, and to vex, harass, oppress, impoverish, and wholly ruin the plaintiff, theretofore, to wit, on the 23rd day of *August*, 1828, at *Chelmsford* aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be composed and published, of and concerning the plaintiff, a certain false, scandalous, malicious, and defamatory libel, of and concerning the plaintiff, that is to say; “*A Cook* (then and there meaning the plaintiff) mistaken for *Jack Ketch*. [From a correspondent]. The following ludicrous occurrence took place

It is a libel to publish a ludicrous story of an individual in a newspaper, if it tend to render him the subject of public ridicule, although he had previously told the story of himself.

An examined copy of an affidavit filed by the proprietor of a newspaper at the stamp-office, did not correspond in terms with the title of the paper, when produced in evidence, but the sub-distributor of stamps produced the paper in which the alleged libel was published, and said that he believed that the defendant was the proprietor, and that he had accounted and paid duties on advertisements inserted therein:—*Held*, that it was sufficient evidence to go to a Jury of a publication by the defendant.

Proof that the plaintiff had been made the subject of laugh-

ter at a public meeting, is admissible, as identifying him with the subject of a libel, and as a proof of the consequences which had necessarily resulted to him from its publication.

A declaration for a libel, after an inducement that one *W. C.* had been tried and convicted of murder, and was about to be hanged for such crime, alleged that the defendant published the libel of and concerning the plaintiff, without averring that it was published of the plaintiff, and of and concerning the matters stated in the indictment:—*Held*, nevertheless, to be sufficient.

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at *Bury*, shortly after the conclusion of the trial of *Corder*, (meaning the said *William Corder*). A respectable deputy overseer (meaning the plaintiff), not two miles from the parish of *St. Mary's* in this town (meaning the town of *Colchester*, in the county aforesaid), like many other Gents., had the curiosity to hear *Corder's* trial. Accordingly, he (meaning the plaintiff) went to *Bury*, and got admission into Court, and, the trial being ended, he adjourned to an inn (not of the highest class), to take some porter, amidst a dozen others, who were, perhaps, as risky as himself. His appearance, which we (meaning the defendant) suppose must have been very singular, struck the company, that he must be a man out of the common way. Accordingly, the question was whispered amongst them who he could be; at length, after a deal of *pro* and *con*, it was decided that he could be no other personage than *Jack Ketch*. After a short pause, one of them emphatically said to him: 'Pray, Sir, arn't you the gemman that's come down to hang *Corder*?' Of course, such a question was the means of his (meaning the plaintiff's) bidding them a respectful farewell.

"The stupid elves mistook him (meaning the plaintiff) by his look,
"Stead of the *Jack*, he proved to be the *Cook*."

By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff had been and was greatly injured in his good name, fame, respectability, credit, and reputation, and brought into public scandal, contempt, ridicule, infamy, and disgrace with and amongst all his neighbours, friends, and acquaintances, and other good and worthy subjects of this realm, insomuch, that divers of those friends, neighbours, and subjects, had, on account of the committing of the said several grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still did refuse, to have any transaction, acquaintance, or discourse with the plaintiff,

as they were before used and accustomed to have done, and otherwise would have done; or to hold or permit any intercourse or society with, or to receive or admit him into their respective houses or company, to wit, at *Chelmsford* aforesaid.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes at *Chelmsford*, it appeared that the plaintiff was an assistant overseer of the poor of the parish of *St. Mary at the Walls*, in the borough of *Colchester*; and, in order to prove the publication by the defendant of the newspaper containing the libel, a witness was called, who produced an examined copy of an affidavit made by the defendant, and filed at the stamp-office, pursuant to the statute 38 *Geo.* 3, c. 78 (a), and in which the defendant described himself as "*Edward John Ward*, of *Colchester*, in the county of *Essex*, printer, publisher, and sole proprietor of the *Colchester Gazette*, and that the newspaper was intended to

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(a) The first section enacts, "That no person shall print or publish any newspaper, until an affidavit be made and signed, and delivered to the commissioners for managing his Majesty's stamp duties." The second section enacts, "That such affidavit shall specify and set forth the real and true names, additions, descriptions, and places of abode of all and every person and persons, who is and are intended to be the printer and printers, publisher and publishers of the newspaper mentioned in such affidavit, and of all the proprietors of the same." The eleventh section enacts, "That it shall not be necessary, after any such affidavit, or a certified copy thereof, shall have been produced in evidence against the persons who signed and made such affidavit,

and after a newspaper shall be produced in evidence, *intituled in the same manner* as the newspaper mentioned in such affidavit or copy is intituled, and wherein *the name or names of the printer and publisher*, or printers and publishers, and *the place of printing*, shall be the same as the name or names of the printer and publisher, or printers and publishers, and *the place of printing* mentioned in such affidavit, for the plaintiff to prove that the newspaper was purchased at any house, shop, or office belonging to, or occupied by, the defendant or defendants, or by his or their servants or workmen, or where he or they, by themselves or their servants, usually carry on the business of printing and publishing such paper, or where the same is usually sold."

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be printed at the printing-office of the said *Edward John Ward*, belonging to his dwelling-house, situate, No. 25, *Head Street*, in the parish of *St. Mary at the Walls*, in the borough of *Colchester*." Another witness produced the *Colchester Gazette* of the 23rd August, 1828, containing the libel in question, and the title of the paper was, "The *Colchester Gazette*, printed and published by *E. J. Ward* (the sole proprietor), *Head Street, Colchester*."

It was then objected, for the defendant, that the copy of the affidavit ought not to be admitted as proof of the publication of the newspaper by the defendant, as it did not correspond in terms with the title of the paper. The learned Judge, however, was of opinion that it was not competent to the publisher to raise such an objection, as it would defeat the object of the statute requiring the affidavit. He therefore refused to stop the cause, but reserved the point for the consideration of the Court, giving the defendant leave to move to enter a nonsuit, if the Court should be of opinion that the copy of the affidavit ought not to have been admitted. A clerk from the office of the sub-distributor of stamps at *Colchester* was then called for the plaintiff, and stated, that he knew the defendant, that he believed him to be the sole proprietor of the *Colchester Gazette*, and that he was in the habit of settling the stamp duties for advertisements inserted in that paper with the defendant; and he produced a copy of the newspaper, dated the 23rd August, 1828, containing the libel, and which paper was marked with various charges and crosses in red ink, for the duties on the advertisements inserted therein, and as paid by the defendant to the sub-distributor of stamps. A witness was then called, who stated that he was a free burgess of the borough of *Colchester*; that he was at a meeting at the *Moot-hall* in *September* last; that the plaintiff, as assistant overseer of the parish of *St. Mary at the Walls* was there to produce the poor-rate books; that a person present proposed a gentleman to be elected Mayor, which he

declined, observing, that if he did not withdraw the nomination, he should be the first person he would hang when he came into office; when some one, pointing to the plaintiff, called out, "And here is *Jack Ketch*," upon which there was a roar of laughter.

For the defendant it was proved, that, previously to the publication in the newspaper, the plaintiff had related the story himself, at a public-house in his own parish, and that he called several persons back who were about to leave the room, in order that they might hear the story, which he told with great glee and humour, and seemed to be much delighted with the joke. The learned Judge having summed up the whole of the evidence to the Jury, told them, that if they thought the paragraph in question was calculated or tended to bring the plaintiff into ridicule, it was a libel; and he left it to them to say whether it were a libel or not, and if it were, to what damages the plaintiff was entitled. They found a verdict for him, damages 10*l*.

Mr. Serjeant *Jones*, in the last term, applied for a rule nisi, that this verdict might be set aside, and a nonsuit entered, or a new trial had;—or that the judgment might be arrested. *First*—The plaintiff did not give sufficient evidence to connect the defendant with the publication of the newspaper containing the libel in question, as the title of the paper did not correspond with the affidavit filed at the stamp-office; and the statute 38 *Geo.* 3, c. 78, requires that the newspaper produced in evidence shall correspond in every respect with the affidavit so filed, *vis.* as to the title of the paper, the names of the printer and publisher, and the place of printing. *Secondly*—As there was no allegation of special damage in the declaration, the evidence as to what passed at the meeting at *Colchester* ought not to have been received, particularly as the plaintiff himself was the cause of the laugh, he having pre-

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viously circulated the story himself, in a public company. *Lastly*—The paragraph is not in itself libellous, nor was it calculated to injure the plaintiff, or to hold him up to ridicule or contempt. He was not described with irony, but as being a respectable person in office, and as having been mistaken by stupid elves for *Jack Ketch*. There was no malicious feeling evinced towards him, nor any attack on his moral character; and although it might have been intended to raise a laugh, it does not follow that it was to be at the plaintiff's expense. But, even if it were libellous, the *innuendoes* in the declaration referred to facts not sufficiently connected with the statement in the inducement. The plaintiff should have averred, not only that the libel was published of and concerning him, but also of and concerning the premises, or of the matters aforesaid, the preceding inducement being the trial and execution of *Corder*. It is a well-known and established principle, that, in written and oral slander, it is necessary to state that the slander was of and concerning the plaintiff, and the preceding inducements: and whenever an inducement of extrinsic matter is essential, it is necessary to aver that the slander was published of and concerning it, and that it related thereto, and which must also be proved. So, where the slander itself does not convey the intended meaning, and is connected with some extrinsic matter previously stated, such matter must be proved accordingly. Mr. Serjeant *Williams*, in a note to the case of *Croft v. Boite* (a), says, "Notwithstanding a *colloquium* is laid to have been had by the defendant with other persons of and concerning the plaintiff, it still seems necessary to introduce the slanderous words by an averment that the defendant spoke them *of and concerning* the plaintiff; and where no *colloquium* is laid to have been had by the defendant of the plaintiff, there seems to be no doubt that the omission of

(a) 1 Wins. Saund. 242 a, n. (3).

such an averment is a fatal defect in the declaration. *Scott v. Hawkins*" (a). In a note to *Todd v. Hastings*, that learned Serjeant says (b), "There seems to be no doubt, that words which are not actionable in themselves, but are only so because they are spoken of a person in his profession, office, or trade, must be alleged in the declaration to have been spoken of him in relation to such his profession, office, or trade, otherwise the declaration contains no cause of action, and judgment will be arrested." In *Hawkes v. Hawkey* Lord *Ellenborough* said (c): "Nothing can be more clear than the rule laid down in the books, and which has been constantly adopted in practice, not only where the words spoken do not in themselves naturally convey the meaning imputed by the *innuendo*, but also where they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter, to make them actionable; it must not only be predicated that such matter existed, but also that the words were spoken of and concerning that matter." Now here, the libel did not of itself convey the meaning imputed to it by the *innuendoes*, but, on the contrary, was connected with the preceding inducement, without which it was ambiguous, and required explanation. In the case of *The King v. Marsden* (d), the words "of and concerning the plaintiff" were omitted; and although the Court were inclined to sustain the indictment, if possible, and it was sought to support it, by contending that, notwithstanding the omission, it was sufficiently shewn of whom the libel was published, it being alleged in the introductory part of the indictment that the defendant, intending to vilify the prosecutor, and to cause it to be believed that he had practised gross corruption, and been guilty of abuse in his office, and concluded to the injury and disgrace of the prosecutor, and the *innuen-*

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(a) 2 Rolle's Rep. 244.

(c) 8 East, 431.

(b) 2 Wms. Saund. 307 a, n. (1).

(d) 4 Mau. & Selw. 164.

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does also applied the different parts of the libel to him; yet Lord *Ellenborough* said (a): “Undoubtedly it is advisable in most cases, and especially in indictments, to adhere to old forms, even if it were only for the sake of uniformity of proceeding. But the words ‘of and concerning’ are very material words, the importance of which has been pronounced by a Court of the highest resort (b);” and Mr. Justice *Bayley* said: “The office of an *innuendo* is merely explanatory; therefore the indictment ought by previous matter to shew something to connect the party libelled with the libellous matter, as, by the words ‘of and concerning.’ The exception is a very strict one, but still it is consonant with the authorities.” And the judgment was arrested. So, here, the statements and *innuendoes* contained in the declaration are not sufficient to support the judgment, for, although the libel is alleged to have been published of and concerning the plaintiff, yet it ought to have been averred that it was published of and concerning him and the facts mentioned in the inducement, *viz.* the trial and execution of *Corder*.

But the Court thought that the declaration was sufficient, and that the paragraph was a libel, as it tended to render the plaintiff a subject of ridicule. The rule, therefore, was granted on the first and second objections only.

Mr. Serjeant *Spankie* now shewed cause.—The requisitions of the statute 38 Geo. 3, c. 78, have been substantially complied with, particularly as against the party making the affidavit; and, although it varied in some trifling respects from the title of the paper produced, yet it was sufficient evidence of the publication, to shew that the paper was published by the defendant *Ward*, at *Colches-*

(a) 4 Mau. & Selw. 168.

(b) See *The King v. Horne*, Cowp. 682.

ter; particularly, as he had described himself as the sole proprietor, both in the affidavit and in the title of the paper; and, if the variance be material, he has subjected himself to the penalties imposed by the act in question. But, independently of the affidavit, there was sufficient evidence to shew that the defendant was the proprietor of the paper, for a clerk of the sub-distributor of stamps at *Colchester* not only proved payments by the defendant for duties on advertisements inserted therein, but that charges for such duties had been made and paid for advertisements inserted in the very paper in which the libel in question was published, and in which the plaintiff described himself as the sole proprietor of the paper, and that it was printed and published by him at *Head Street, Colchester*. In the case of *The King v. Topham* (a), proof that the defendant, as proprietor of a newspaper, had given a bond to the stamp-office, pursuant to the statute 29 Geo. 3, c. 50, s. 10, and that he had from time to time applied to the stamp-office respecting the duties on the paper, was held to be sufficient evidence from which the Jury might infer that he was the publisher. In the case of *The King v. Franckling* (b), the proof of payment of the stamp-duties was held to be sufficient to shew a party to be the proprietor of a newspaper; and in the late case of *The King v. Amphitt* (c), the copy of a newspaper delivered at the stamp office, under the provisions of the statute 38 Geo. 3, c. 78, was held to be conclusive evidence of publication to sustain an indictment against the proprietor for a libel contained in such copy; and here, the defendant not only delivered the paper, but accounted and paid for the duties on advertisements inserted in the identical paper in which the libel was published.—With respect to the evidence of what passed at the meeting at the *Moot-hall*, it was proper-

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(a) 4 Term Rep. 126.

(b) 17 Howell's State Trials, 648.

(c) 6 Dow. & Ryl. 125; S. C. 4 Barn. & Cress. 35.

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ly received, as it was not offered as proof of special damage, but merely to shew the tendency and consequence of the publication of the libel, and that the plaintiff was the person adverted to, and which rendered him contemptible and ridiculous; and that he had been made a subject of laughter at a public meeting, which the plaintiff attended in his character of assistant-overseer; and, as the damages were only 10*l.*, the Court will not say that they are exorbitant or excessive.

Mr. Serjeant *Jones*, in support of his rule.—Although the mode of proving a person to be the publisher or proprietor of a newspaper has been much facilitated by the 38 *Geo.* 3, the principal object of which was to prevent the mischiefs arising from the printing and publishing of newspapers by persons unknown; yet, the statute requires that the paper produced in evidence should correspond in every respect with the affidavit filed at the stamp-office; and here, the name of the publisher and the place of publication are widely different; there is, consequently, a material and fatal variance between the paper produced and the affidavit so filed. In the late case of *Murray v. Sowler*(a), which was tried before Lord *Tenterden* at *Guildhall*, on the 28th *July* last, the defendant was the proprietor of the *Manchester Courier*, the place of publication stated in the newspaper was at *St. Ann's Square*, and the affidavit described the place of intended publication to be *Red Lion Street, St. Ann's Square*; for the defendant it was submitted, that, if a plaintiff wish to dispense with the ordinary method of proof, and to avail himself of the statute, he must produce a newspaper corresponding in every particular as to the name of the publisher and place of publication with the affidavit filed at the stamp-office. It was then proposed to shew, that the place stated in the affidavit, and that stated in the paper, was one

(a) Not reported.

and the same place, the house being a corner house and one part of it in *Red Lion Street* and the other in *St. Ann's Square*. But his Lordship was of opinion, that even the evidence of that fact would not cure the defect; and observed, that the act of Parliament afforded great facility in cases of this description, and that it was of the highest importance that its requisites should be most strictly complied with; and he directed a nonsuit. Here, the variance between the affidavit and the newspaper produced is far greater, for, *non constat* that *E. J. Ward* mentioned in the latter is identically *Edward John Ward* described in the former, or that the paper published at *Head Street, Colchester*, is the same paper that was described in the affidavit as intended to be published at the printing-office of the said *John Edward Ward, belonging to* his dwelling-house, at No. 25, *Head Street*, in the parish of *St. Mary at the Walls*, in the borough of *Colchester*. Although, as the clerk to the sub-distributor of stamps proved that the defendant had paid the duties on advertisements inserted in the paper in which the libel was published, it might be sufficient proof that the defendant was the proprietor of the paper, yet it was no evidence that he was the publisher; and in the case of *The King v. Topham*, it was proved that the paper was sold at the office of the publisher; and here, although the defendant admitted himself to be the sole proprietor, it was incumbent on the plaintiff to shew the fact of publication by him, either by a purchase of the paper at his office, or where it was usually published. The 17th section of the statute requires the printer or publisher to deliver to the commissioners of stamps, at their head office, one of the papers signed by the printer or publisher, with his name and place of abode, and enacts, "That, in case any person shall make application to the commissioners, in order that such newspaper so signed may be produced in evidence in any civil or criminal proceeding, the commissioners shall, at any time within two years from the publication, either cause

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the same to be produced in the Court in which it is required to be produced, or shall deliver the same to the party applying for it, taking, according to their discretion, reasonable security, at his expense, for returning the same to the commissioners." The plaintiff ought to have adopted that course, and the copy of the affidavit alone was not sufficient evidence of publication to charge the defendant. *Lastly*, although, if a party publish a paragraph in a newspaper, which is calculated to render a person contemptible or ridiculous, it is a libel, and the publisher is amenable for the consequences; yet here, the plaintiff himself had previously told the story complained of at a public-house; and evidence of what took place at the meeting at the *Moot-hall* ought not to have been admitted, as the persons who attended there might have been present when the plaintiff told the story, and it did not appear that they were made acquainted with it through the medium of the paper in question; and the Jury were certainly influenced by the testimony of the witness, who stated, that, on the plaintiff's being designated as *Jack Ketoh*, the persons present at the meeting were convulsed with laughter.

Lord Chief Justice TINDAL.—This rule was granted on two grounds—*first*, that the publication of the libel by the defendant was not made out by sufficient evidence—and *secondly*, that evidence was improperly received as to the alleged damage the plaintiff had sustained. *First*, it is said that the particular mode pointed out by the statute 38 Geo. 3, c. 78, has not been observed, and that the title of the newspaper in which the libel was published does not correspond with the affidavit made by the defendant, as proprietor of the paper, and filed at the stamp-office. Upon that point, however, it will not be necessary to express any opinion, because, independently of the statute, there was abundant evidence for the Jury to presume that the defendant was the publisher of the paper in question.

A clerk to the sub-distributor of stamps at *Colchester* produced the identical paper, which had remained in the office of such distributor, and on which marks and crosses were made in red ink, denoting the sums accounted for and paid by the defendant to the collector of the stamp-duties, for advertisements inserted in the paper of that day, and in which the defendant described himself as the sole proprietor. That, surely, was sufficient evidence for the Jury to conclude that the defendant was the proprietor and publisher of the paper. But, *secondly*, it has been said, that evidence was improperly admitted, which tended to influence the minds of the Jury, *viz.* that the plaintiff had been made an object of ridicule at a public meeting. The amount of the damages was not large, being only 10*l.*, and the plaintiff alleged in his declaration, that, by means of the publishing of the libel, he had been greatly injured in his respectability and credit, and brought into contempt, ridicule, and disgrace amongst all his neighbours, friends, and acquaintance. The evidence, therefore, of his having been laughed at, at a public meeting, was properly admitted, as identifying the plaintiff with the subject of the libel, and as a proof of the consequences which had necessarily resulted to him from its publication. But it has been further said, that the plaintiff could have no legal claim to damages, or just ground of complaint against the defendant for publishing a story, of which the plaintiff himself was the author. But it did not appear that he ever authorized the publication by the defendant; and there is a wide distinction between a man's telling a ludicrous story of himself, in the private circle of his friends and acquaintance, and the publication of it to the world at large, through the medium of a newspaper.

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Mr. Justice PARK.—It is unnecessary for me to express any opinion as to the construction of the statute 38 *Geo.* 3, particularly as the point is now under the consideration

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of the Court of *King's Bench* (a): for here, additional and ample evidence was adduced, independently of the affidavit; and if it had been altogether excluded, the Jury would have been warranted in finding that the defendant was the proprietor and publisher of the paper; and I do not see from the pregnant proof before them, how they could have come to any other conclusion. With respect to the evidence received, and which it has been said tended to augment the damages, I agree, that, if it had been offered for the purpose of proving *special damage*, in the legal acceptance of that term, it ought not to have been admitted; but it was offered in order to identify the plaintiff as the person to whom the ridicule of the libel attached, and that he had in consequence been made the subject of ridicule at a public meeting.

Mr. Justice GASELEE.—I am of the same opinion.

Mr. Justice BOSANQUET.—I also think that this rule must be discharged. It is unnecessary to express any opinion as to the construction of the statute, as there was sufficient parol evidence, independently of the affidavit, to warrant the Jury in concluding that the defendant was the proprietor and publisher of the newspaper in which the alleged libel was inserted. The evidence that the plaintiff had been made the subject of ridicule and laughter at the *Moot-hall*, was offered to shew that the libel applied to him, and although he had previously circulated the story himself to some of his acquaintances, it would not justify the defendant in publishing it in his newspaper.

Rule discharged.

(a) See *Mayne v. Fletcher*, 4 Man. & Ryl. 311; S. C., 9 Barn. & Cress. 382, where the publication of a libel contained in a newspaper, was held to be prov-

ed by the production of the paper corresponding in title with that described in the affidavit of the printer lodged at the stamp office.

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Tuesday,
Feb. 9th.

FARRANCE v NILL.

THIS was an action on the case for obstructing a way over which the plaintiff claimed a right to pass; and as he did not give satisfactory evidence of user within the last twenty years, Mr. Justice *Park*, before whom the cause was tried, at the last Assizes for the county of *Surrey*, directed a nonsuit.

The statute 17 *Car. 2*, c. 8, which enacts, that, in all personal actions, the death of either party, between the verdict and the judgment, shall not be alleged for error, does not apply to a case of nonsuit.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi, that this nonsuit might be set aside and a new trial had; on the ground that the plaintiff had merely suspended his right during the continuance of a lease which had but lately expired.

Mr. Serjeant *Taddy*, being now about to shew cause, produced an affidavit, stating the death of the defendant since the rule was obtained. The learned Serjeant submitted, that the suit was abated in consequence, and that the statute 17 *Car. 2*, c. 8, which enacts, that, "in all actions personal, real, or mixed, the death of either party, between the verdict and the judgment, shall not be alleged for error," does not apply to a case of nonsuit, but only where there has been a verdict. So, if the defendant had died before plea pleaded, there would be no party in Court to defend the action, and the suit would necessarily have abated by his death.

The Court intimating a strong opinion that the statute of *Charles* did not apply to cases of nonsuit—

Mr. Serjeant *Wilde* admitted that he was not in a situation to support his rule, and it was consequently—

Discharged.

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Wednesday,
Feb. 10th.

CHARLETON and Another v. MORRIS and BEAVAN, Bail
of GREENAWAY.

Bail above having justified, they consented to a *cognovit* being given upon such terms as might be agreed on between the plaintiff and the defendant (their principal); default having been made at the time the debt and costs were to be paid by the terms of the *cognovit*, and a negotiation afterwards took place between the parties, but which was of no avail, and the plaintiff sued out writs of *scire facias* against the bail, and signed judgment thereon, without giving them notice that the negotiation was at an end, or that the *cognovit* remained unsatisfied—the Court ordered the writs and subsequent proceedings to be set aside.

THE bail in this cause, having justified for the defendant *Greenaway*, afterwards consented to a *cognovit* being given by him upon such terms as might be agreed on between the plaintiff and the defendant. A *cognovit* was accordingly given by the defendant on the 5th *February*, 1829, by which he undertook to pay a moiety of the costs incurred in the action on the 5th *March* then next, and the remaining moiety, together with the amount of the debt for the recovery of which the action was brought, and interest, on the 5th *May* then next; and, if the defendant *Greenaway* made default in either of such payments, the plaintiffs were to be at liberty to sign judgment and proceed thereon, as they might be afterwards advised. The defendant made default in payment of the debt on the day stipulated, and a negotiation was afterwards entered into between the plaintiffs and *Greenaway's* attorneys for further time, which proving unavailing, judgment was signed against *Greenaway* on the 13th *June*, 1829; and on the 30th a writ of *capias ad satisfaciendum* was sued out thereon, and left in the Secondary's office, with instructions by the plaintiffs' attorney to be returned *non est inventus*. On the 27th *October* and 13th *November*, two writs of *scire facias* were respectively sued out against the present defendants, as bail of *Greenaway*, and left at the office of the Sheriff of *Middlesex*, with directions to be returned *nihil*; and judgment was signed against both the bail on the 26th *November* following.

Mr. Serjeant *Wilde*, on a former day in this term, on an affidavit of the above facts, obtained a rule *nisi*, to set aside the above two writs of *scire facias*, and the

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judgments signed thereupon, and he produced affidavits made by both the defendants, who deposed that they had no notice whatever of any of the proceedings subsequently to the giving of the *cognovit*, until the 21st *December* last, when the defendant *Morris* was informed that a writ of execution had been sued out against him at the suit of the plaintiffs, for the amount of the debt due from *Greenaway* to them; and that on the 22nd *December*, on which day the writs of *scire facias* had not been filed at the office of the *custos brevium*, the defendants caused *Greenaway* to be taken into custody and detained, in order to surrender him in their discharge, which they could have done at any time if the plaintiffs had informed them that they intended to proceed in the suit. The learned Serjeant relied on the case of *Clift v. Gye* (a), where a plaintiff, with the consent of the bail to the Sheriff, having taken a *cognovit* with a stay of execution for a month, it was held, that, although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against the bail without giving them notice that the *cognovit* was unsatisfied. So, in *Farmer v. Thorley* (b), the Court were of opinion that bail to the Sheriff were discharged by the defendant's giving a *cognovit* for payment of debt and costs, because the plaintiffs have no right to proceed upon the bond, unless there was a continuing breach, which could not be, where a *cognovit* had been taken, that being an admission by the plaintiffs, that the defendant had appeared to the action, and was properly in Court.

Mr. Serjeant *Taddy* and Mr. Serjeant *Andrews* now shewed cause.—It is said, that, although the plaintiffs took a *cognovit* from *Greenaway*, with the consent of the bail, and by which the execution was stayed, still that the plaintiffs

(a) 9 Barn. & Cress. 422.

(b) 4 Barn. & Ald. 91.

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could not proceed against them without giving them notice that the *cognovit* was not satisfied, on the authority of *Clift v. Gye*; yet that case is distinguishable from the present, as there the *cognovit* was given with the consent of the bail to the Sheriff, and the plaintiffs took an assignment of the bail-bond, and issued writs against the bail without giving them any notice. But that does not apply to the case of bail above, who consented to a *cognovit* being given upon such terms as might be agreed upon between the plaintiff in the suit and their principal. By so doing, they continued liable, as though no *cognovit* had been given; and they cannot complain of want of notice, as they were bound to watch the plaintiff's proceedings, they having received an act of indulgence, by time being given to their principal.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—I am of opinion, that the rule for setting aside the writs of *scire facias* sued out against the defendants, as bail of *Greenaway*, and the judgments entered up thereon, must be made absolute. If the agreement had originally been, that the bail would consent to any terms their principal might then or afterwards make, the case might have been different, although even then it seems to me it would fall within the principle of *Clift v. Gye*. But all that the bail here did in the first instance was, to consent to a *cognovit* being given upon such terms as might be agreed upon between the plaintiffs and their principal; that is, upon such terms as might be agreed on at the time of executing the *cognovit*. In *Clift v. Gye*, the bail to the Sheriff, on being sued, became bail above, and justified, and rendered their principal, and the Court ordered the proceedings on the bail-bond to be set aside. Here, by the terms of the *cognovit*, part of the costs

were to be paid on the 5th *March*, and the residue, with the amount of the debt, on the 5th *May* following; and, if there were any negotiations between the parties subsequent to that day, and which there appear to have been, the bail should at least have been informed that they had been put an end to, and that the *cognovit* still remained unsatisfied; as they might then have had an opportunity of rendering their principal in their discharge, which they have deposed they believed they could have done, if the plaintiffs had informed them that they meant to proceed with the suit.

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Mr. Justice PARK.—Although this case is distinguishable from *Clift v. Gye*, from the circumstance that there the bail to the Sheriff consented to the giving of the *cognovit*, yet the principle is the same. There, too, the execution was to be stayed for any period not exceeding a month, and the bail to the Sheriff were only responsible until special bail had been put in and perfected; and when they were sued, they justified as bail above, and rendered their principal, and the Court held that they were entitled to notice that the *cognovit* remained unsatisfied; and as it was not given, the proceedings on the bail-bond were set aside with costs; and Lord *Tenterden* said, “The bail entered into an agreement, the fair interpretation of which appears to be, that they shall remain liable notwithstanding the *cognovit*, but that the time for putting in bail above shall be enlarged. I think that the time for so doing cannot reasonably be held to have expired, until they received notice that the *cognovit* was unsatisfied.” In justice, bail should have the fullest possible information, before any proceedings are taken against them for a default made by their principal; and I therefore think that it was the duty of the plaintiffs to have given the defendants notice that the negotiation, subsequent to the day when the debt ought

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to have been paid, had been broken off; and that, as they did not do so, this rule must be made absolute.

Mr. Justice GASELEE.—The defendants made this application to me at Chambers; but, as there were certain disputed facts, I desired the parties to come to the Court; and now, all the circumstances being before us on affidavit, I agree in thinking that this rule must be made absolute. It is true that the practice still continues, that, in proceeding against bail, a return of two *nihil*s is equivalent to a *scire feci*; yet, in *Beddington v. Beddington* (a), the Court expressed its displeasure, and intimated a strong opinion that such practice ought not to prevail in future. If the bail are respectable, and may be easily found, justice requires that they should have due notice before proceedings are taken against them for the default of their principal, and I very much doubt whether the Sheriff, or the party directing the writs to be returned *nihil*, would not be liable to an action at the suit of the bail if such notice were not given; and I again express my earnest wish that this practice may be put a stop to.

Mr. Justice BOSANQUET concurring—

Rule absolute.

(a) 2 Moore & Payne, 481.

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SAWBRIDGE, Demandant; JEYES, Tenant; PARSONS and
three Others, Vouchees.

Wednesday,
Feb. 10th.

MR. Serjeant *Peake* moved that this recovery might pass and be recorded as of this term, notwithstanding the acknowledgments of the vouchees were taken on two separate pieces of parchment. The learned Serjeant produced an affidavit, which stated, that the writ of *dedimus potestatem* was directed to three commissioners, who resided at a distance from each other; that the vouchees lived in different parts of the country; that the warrants of attorney were joint and several; that two of the vouchees had acknowledged in the one, and two in the other; and that the language of both was the same, with the exception of the names of the parties. Although, in *Balch v. Phelps* (a), where a writ of *dedimus potestatem* had been directed to commissioners to take the acknowledgments of nine persons: the commissioners took the acknowledgments of six on one piece of parchment, and of the remaining three upon another piece of parchment, the Court would not allow the fine to pass; and Mr. Justice *Heath* said, that "these separate acknowledgments would not warrant a joint judgment:" yet, in *Lang*, demandant; *Lee*, tenant; *Woodhouse*, vouchee (b), where an objection was raised to the warrants of attorney of several vouchees, because they were on separate pieces of parchment, that learned Judge said, that "the warrants would be good, even in a real suit." And, in the case of *Hicks*, demandant; *Dean*, tenant; *Crump*, vouchee (c), the Court allowed a recovery to pass, although the warrants of attorney of several vouchees were on different pieces of parchment.

The Court permitted a recovery to pass, although the warrants of attorney of four vouchees were on two separate pieces of parchment.

(a) 3 Bos. & Pul. 366.

(b) 1 Bos. & Pul. 31.

(c) 12 B. Moore, 295.

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SAWBRIDGE,
Demandant;
JEYES,
Tenant;
PARSONS,
Vouchee.

Lord Chief Justice TINDAL.—I see no objection, on principle, to the passing of this recovery. The writ of *dedimus potestatem* was directed to three commissioners, who resided at a distance from each other, and the vouchees lived in different parts of the country:—the commissioners, for convenience, took the acknowledgments of two of the vouchees on one piece of parchment, and of the other two on another; and if, as Mr. Justice *Heath* said, in the case of *Lang*, demandant, that the warrants would be good in a real suit, or an adverse action for the recovery of land, I am at a loss to discover why they should not be equally good in a recovery, which is suffered for the purpose of the conveyance of land.

The rest of the Court concurring—

The recovery was permitted to pass.

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Feb. 10th.

The defendants arrested the plaintiff on a *ca. sa.*, as the bail of one *E. M.*, for whom he had never become bail. After the plaintiff had been in custody nearly a month, he was discharged by an order of a Judge. The defendants had previously discovered their

BARNARD M'CRANDLE, v. BARWISE and WARRY.

THIS was an action of trespass for false imprisonment, and brought under the following circumstances:—The plaintiff being ill, and confined to his room, was, on the 17th *July*, 1824, arrested under a writ of *capias ad satisfaciendum*, sued out at the suit of the defendant *Barwise*, against the plaintiff, as the bail of one *Elizabeth Meeke*, whom *Barwise* had sued in the Court of *King's Bench*, and obtained judgment against her for the sum of 141*l.* The plaintiff, however, had never become bail for

mistake, and promised to liberate the plaintiff, but did not do so. He afterwards brought trespass against the defendants, for false imprisonment, and they pleaded the general issue; and that the plaintiff had, together with another person, acknowledged a recognizance of bail, upon which the *ca. sa.* had issued, and that the recognizance still remained on the file of the Court of *King's Bench*. This Court refused to strike out the plea, or rescind the order to plead several matters, although it was objected that the plaintiff could not safely reply.

Mrs. *Meeke*, nor did he even know her by name. Some time after the plaintiff had been in custody, a clerk of the defendant *Warry*, who acted as attorney for *Barwise*, saw the plaintiff, when he instantly declared that he was not the person who justified as bail for Mrs. *Meeke* under the name of *Barnard M'Crandle*, for that he was in Court when her bail justified; and, upon the plaintiff and the clerk making an affidavit that he was not the person who had become bail, the defendant *Warry*, on the 13th *August*, promised to see his client *Barwise* immediately, and set the plaintiff at large. The plaintiff, however, continued in custody until the 26th *August*, when he was discharged by an order of the Lord Chief Justice of the Court of *King's Bench*. The present action was commenced in *August*, 1828.

The defendants pleaded—*first*, not guilty—*secondly*, the statute of limitations—and *lastly*, by way of justification, that the plaintiff had, together with one *Pelham Hollis*, acknowledged a recognizance of bail in an action brought by the defendant *Barwise* against *Elisabeth Meeke*, upon which the writ of *ca. sa.* had been sued out against the plaintiff, and that the recognizance was now remaining upon the file of the Court of *King's Bench*. The plaintiff having been advised by counsel that he could not safely reply to this plea, obtained time for so doing, until an application could be made to the Court of *King's Bench* upon the subject of the recognizance. A rule *nisi* for delivering up the recognizance to be cancelled was accordingly obtained in that Court, but, upon cause being shewn, was discharged; the Court intimating an opinion that the plaintiff might reply without difficulty, notwithstanding the defendants had alleged in their plea, that the plaintiff had acknowledged a recognizance which was still remaining on the file of the Court.

Mr. Serjeant *Adams*, upon an affidavit of these facts, on

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a former day in this term, obtained a rule calling on the defendants to shew cause why their last plea should not be struck out, and why the plaintiff might not have further time to reply. The learned Serjeant submitted that the plea must be false within the defendants' own knowledge, as *Warry*, who acted as attorney for *Barwise*, promised to see him on the 13th *August*, and discharge the plaintiff out of custody; *Warry's* own clerk having deposed that the plaintiff was not the person who justified as bail for Mrs. *Meeke*.

Mr. Serjeant *Wilde* and Mr. Serjeant *Peake* were now about to shew cause, when the Court called on—


Mr. Serjeant *Adams* to support his rule.—Unless this plea be struck out or taken off the file, the plaintiff is without redress, as he cannot deny the existence of the recognizance, or that it does not now remain on the file of the Court of *King's Bench*: neither can he deny the fact alleged in the plea, that the persons therein named, or either of them, did not acknowledge a recognizance of bail in the action against Mrs. *Meeke*. Justice requires that the plea should be struck out, because it is false within the defendants' own knowledge.

[Lord Chief Justice *Tindal*.—Might not the plaintiff reply that he is not the *Barnard M'Crandle* named in the recognizance?]

It is doubtful whether such a replication would be good on demurrer; but, as the plea is false, the Court will feel no difficulty in ordering it to be struck out; and it is quite clear that they may exercise their discretion upon the subject. In the late case of *Gully v. The Bishop of Exeter* (*a*), the Court, even after a nonsuit, and a rule absolute for a new trial, rescinded the original rule to plead

(a) 2 Moore & Payne, 105; S. C. 5 Bing. 45.

several matters, and ordered a number of pleas to be struck out; and Lord Chief Justice *Best* there said (a): "It was a principle at common law, that all pleadings ought to be true, but that has long since been lost sight of, and can rarely, if ever, be the case, where several pleas are pleaded. It is, therefore, in the discretion of the Court to allow such pleas only as they may deem necessary or essential to the justice of the case." That reasoning is particularly applicable to this case; and, in *Whale v. Lenny* (b), the Court would not allow inconsistent pleas to be put upon the record. But, on the ground that the plea in question is false within the defendants' own knowledge, it ought to be struck out, particularly as they have also pleaded the general issue and the statute of limitations.

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Lord Chief Justice TINDAL.—This is a rule calling on the defendants to shew cause why their last plea of justification should not be struck out, and why the plaintiff should not have further time to reply. It appears to me, that the facts alleged in that plea are relied on by the defendants as a defence to this action, and I am not aware of any authority, where the matter of defence is on the record, to deprive a party of such defence. The question might have been different, if the alleged inconsistency of the defence, and the fact that the plea had involved the plaintiff in difficulty, had been pointed out to us when the rule to plead several matters was obtained, as in the case to which we have been referred of *Gully v. The Bishop of Exeter*. I much regret the alleged difficulty as to the mode of replying to this plea; yet, as the defendants have pleaded it as matter of defence, we cannot interfere. The plaintiff, however, may be mistaken in that view of his case; and it may be worth while for him to consider, whether he has not taken

(a) 2 Moore & Payne, 121.

(b) Id. 19; S. C. 5 Bing. 12.

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a wrong course to recover compensation from the defendants for the injury he has sustained from his imprisonment. If the defendants caused him to be wilfully or improperly detained in custody after they knew that he was not the person named in the recognizance, it would be a malicious detention, for which an action on the case might be maintained. On this point, however, I give no opinion; I merely suggest it for the consideration of the plaintiff.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—I am of opinion that we cannot act on this rule, or order the defendants' plea to be struck out. In *Gully v. The Bishop of Exeter*, the objection was raised to the number of the pleas on shewing cause against the rule to plead several matters; and the Court reduced the pleas accordingly, two only being necessary for the defence. If a plea be put in fraudulently, or is false upon the face of it, it is a contempt of Court, and may be set aside. With respect to the alleged difficulty as to the replication, might not the plaintiff reply, that, although true it is that *Barnard M'Crandle* and *Pelham Hollis* acknowledged a recognizance of bail in the action against *Elisabeth Meeke*, and that the recognizance, was still remaining in the Court of *King's Bench*, yet that the said *Barnard M'Crandle*, named in that recognizance, was not the plaintiff, and then traverse the fact of his having entered into any recognizance in the action against *Meeke*?

Mr. Justice BOSANQUET.—The defendants appear to rely on the facts stated in the last plea as a justification for the imprisonment of the plaintiff, and we cannot deprive them of this mode of defence.

Rule discharged.

Mr. Serjeant *Adams* then moved to rescind the rule to plead several matters.

But the Court said, that the application was too late. The objection to the plea should have been raised on shewing cause against the rule. The case of *Gully v. The Bishop of Exeter* is distinguishable from the present, as there the defendant put a number of unnecessary pleas on the record, which made it of an unwarrantable length, and two only were sufficient for his defence. But the plaintiff may have a fortnight's time to reply.

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BARLING v. WATERS.

Wednesday,
Feb. 10th.

A RULE was obtained by Mr. Serjeant *Merewether*, on a former day in this term, calling on the defendant to shew cause why the rule for the allowance of bail in this cause should not be discharged, and why the defendant, who was then in the custody of the Sheriff of *Middlesex*, should not be detained in custody in another suit, and why the bail who had justified for the defendant should not attend personally in Court, and why they or the defendant should not pay the costs of this application. The motion was made on affidavits, which stated, that, when the bail came up to justify for the defendant in this action, one of them swore that he had property in the funds to a considerable amount, after payment of all his debts; and the other, that he had paid the amount of a judgment obtained against him in the *Palace* Court: and that it had since been ascertained that both these statements were false.

The Court ordered a rule for the allowance of bail to be discharged (no cause being shewn to the contrary), the bail having, on their justification, perjured themselves as to the amount of their property. But the Court refused to order the defendant to be detained in custody in another suit, as it was not shewn that he was privy to the perjury of the bail, and the only remedy against them is by indictment.

No cause being shewn against this rule, the learned Serjeant now moved to make it absolute, on an affidavit of service of the rule *nisi* upon the defendant and both of the bail; and he stated, that the Court of *King's Bench* had lately ordered an attachment to be issued against a

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person who had committed perjury on justifying as bail, and who had not attended in Court pursuant to an order so to do.

But the Court held, that they could only direct the rule to be made absolute, as far as regarded the discharging the rule for the allowance of bail; that the plaintiff's only remedy against the bail was by an indictment for perjury; and, as it was not shewn that the defendant was privy to, or knew of their perjury, there was no ground to detain him in custody in another suit.

Rule absolute accordingly (a).

(a) See *Shee v. Abbott*, 5 B. Moore, 321; S. C. 2 Brod. & Bing. 619.

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HOULDEN v. FASSON.

A bailable *capias* having been made returnable on a day certain, instead of a general return day, the defendant having given a bail bond, the Court would not allow the writ to be amended, as it would prejudice the bail.

MR. Serjeant *Merewether*, in the last term, obtained a rule *nisi*, that the writ of *capias ad respondendum*, which had been sued out by the plaintiff against the defendant in this cause, might be amended on payment of costs by the plaintiff. The learned Serjeant produced an affidavit made by a clerk of the plaintiff's attorney, which stated, that, by a misapprehension or mistake on his part, the writ had been made returnable on "the 3rd day of November," instead of the usual return, on "the morrow of All Souls."

Mr. Serjeant *Wilde*, on a former day in this term, shewed cause, and submitted, that, as the defendant had given a bail bond (a), the Court would not allow the writ

(a) See 3 Moore & Payne, 559.

to be amended, as it would affect the bail; and, in *Johnson v. Dobell* (a), where the defendant having been arrested on a *capias* returnable on a day certain, instead of on a general return day, and given a bail-bond to the Sheriff, the Court refused an amendment of the writ, unless the plaintiff would consent to discharge the bail upon the defendant's entering a common appearance.

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The Court said that that case was expressly in point, and an answer to the application; that the writ being a nullity, the bail were discharged from their recognizance; and that they could not be again rendered liable, which they would be, by the amendment of the writ.

Rule discharged.

(a) 1 Moore & Payne, 28.

SAME v. SAME.

A RULE *nisi* was afterwards obtained by Mr. Serjeant *Wilde* to set aside the writ and the bail-bond taken thereon, and all subsequent proceedings, for the above alleged irregularity, with costs.

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Where a writ of *capias* was made returnable on the 3rd of November, being a day certain, instead of the general return day, viz. on the morrow of *All Souls*, and the defendant had given a bail-bond, the Court ordered the writ to be quashed.

Mr. Serjeant *Merewether* now shewed cause.—Although the statute 24 Geo. 2, c. 48, s. 7, enacts, that all writs which shall happen to be returnable in *Michaelmas* Term, shall have and keep the returns of the morrow of *All Souls*; the morrow of St. *Martin*; in eight days of St. *Martin*; and in fifteen days of St. *Martin*: yet the morrow of *All Souls* means *the day* of the morrow of *All Souls*, which is the 3rd day of *November*, and the first day of the term; and here,

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the writ was made returnable on the 3rd day of *November*; which is sufficient, and is not such a misdescription as to render it altogether void. The calendar is part of the law of the land, and the 3rd *November* is also therein described as the morrow of *All Souls*; and, although the practice has been to use the latter description of that day, yet the Court will look at the substance rather than the form of the writ, and support it, if it appear to be in fact returnable on the proper day of the month. If the writ in question were described in the declaration on the bail-bond as being returnable on the morrow of *All Souls*, to wit, on the 3rd day of *November*, it would be a good description, and a sufficient compliance with the terms of the statute; and, if the writ were produced in evidence to sustain that allegation, there would be no variance. In all the cases where writs have been set aside for irregularities as to the return days, the day certain has not been the same day as the general return day, as in this case, where the error arose from a mere misapprehension of the attorney's clerk. In *Crofts v. Stockley* (a), where a declaration on a bail-bond stated the arrest of the principal by virtue of a *capias* sued out of the Court of our Lord the now King, before &c., then *his Majesty's Justices of the Bench at Westminster*, and averred the condition of the bond to be, that, if the principal should appear, according to the exigency of the said writ, in the said Court, the bond was to be void; and, on the production of the bond, the condition was for the appearance of the principal *before our sovereign lord the King, at Westminster*, to answer the plaintiff in a plea of trespass, and according to the custom of *the King's Court of Common Bench*, it was held to be no variance, because it was alleged in substance that the bail-bond was taken for the appearance of the principal in this Court. In *Mills v. Bond* (b), the writ was returnable on

(a) 2 Moore & Payne, 81; S. C. 5 Bing. 32.

(b) 1 Str. 399.

a day out of term; and, in *Inman v. Huish* (a), it was made returnable on the last day of *Michaelmas* term, and it was not even stated that that day was the 28th *November*. In *Walker v. Hawkey* (b), where a *capias* was made returnable on a day certain, instead of on a general return day, the Court allowed the writ to be amended, even after a rule had been obtained to quash it for irregularity; and, in *Johanson v. Dobell*, the *capias* was returnable on *Tuesday next after the morrow of All Souls*, instead of on the morrow of *All Souls*, which was clearly an irregularity; whilst here, the writ was returnable on the 3rd *November*, which was in fact the morrow of *All Souls*. Although the statutes 5 & 6 *William & Mary*, c. 21, s. 4, and 9 & 10 *William 3*, c. 25, s. 42, require the officer who shall sign any writ or process to arrest any person before judgment, at the signing thereof to set down, upon such writ or process, the day and year of his signing the same, yet the indorsement of the date is no part of the writ; the only object of the Legislature being, to render the process more intelligible, as an unlettered layman could not be acquainted with the technical return days named in the body of the writ.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

LORD CHIEF JUSTICE TINDAL.—These common and general returns on original writs have been handed down from all time, and as the mode of return here adopted has never been sanctioned by any rule or order of the Court, we ought not to depart from the long established practice, or allow parties to make writs of their own, or contrary to the form pointed out by the Legislature; and it has been uniformly held in this Court, that, if a writ be made returnable on a day certain, instead of on a general return

(a) 2 *New Rep.* 133.

(b) 5 *Taunt.* 853; S. C. 1 *Marsh.* 399.

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day, it is irregular and void if the defendant has given a bail-bond, as the amendment, if allowed, would prejudice the bail.

The rest of the Court concurring—

Rule absolute.

Thursday,
 Feb. 11th.

SHEPHERD and Thirty-two Others v. The Bishop of CHESTER, HUDSON, Clerk, and AIREY, Clerk.


In *quare impedit*, a count, alleging an immemorial right in the plaintiffs, as owners of messuages and lands within a chapelry, (which lands were charged with the payment of yearly sums for the repair of the chapel), to nominate a curate and present him to the bishop; and it was proved that part of the repairs of the chapel were defrayed out of the poor-rates:—*Held*, to be a variance, and that the evidence did not support the allegation. Where two issues were found for the plaintiffs, and two for the defendants, and the Jury were discharged as to the fifth, and the verdict was entered accordingly, but leave was given to the defendants to move to enter a nonsuit:—*Held*, that the Court might direct the nonsuit to be entered, although the defendants had a verdict on some of the issues.

QUARE impedit.—The declaration contained four counts. The first stated, that, from time whereof the memory of man is not to the contrary, there hath been, and still is, a certain ancient chapel, for the celebration of divine worship therein, situate and being in the chapelry of *Grayrigg*, in the parish of *Kendall*, in the county of *Westmoreland*, for the use of the inhabitants of the said chapelry; which said chapelry, during all the time aforesaid, contained and comprised within it divers, to wit, five several townships, to wit, &c. &c. (naming them). That also, during all the time aforesaid, certain sums of money have from time to time been requisite and necessary, as well for the maintenance, upholding, and repairing of the said chapel, as for the maintenance, support, and salary of the licensed curate, officiating, performing, and celebrating divine service within the said chapel, which said sums of money, *the owners* of the several messuages, lands, and tenements, situate, lying, and being within the said chapelry, have, from time whereof the memory of man is not to the contrary, in respect of those messuages, lands, and tene-

Quare—Whether there can be more than one count in a declaration in *quare impedit*?

ments, been *rateably charged* with, and used and accustomed to pay, and been obliged to pay, supply, and contribute for those purposes, *whenever need was, and occasion required*. That, whenever, at any time, the said chapel became and was vacant, by the death, resignation, or deprivation of the said incumbent thereof, or otherwise, *the major part of the owners* of the said messuages, lands, and tenements, have, in respect of those messuages, &c. &c., and in respect of the payments *so charged* or made by them as aforesaid, from time whereof &c., been used and accustomed to elect, nominate, and choose, and still of right ought to elect, nominate, and choose, a fit and proper person, being in holy orders, to be curate of the said chapel, and to present the said person so elected, nominated, and chosen, to the bishop for the time being of the diocese in which the said chapel is situate, to wit, to the bishop of the diocese of *Chester*, for the purpose of being licensed by him to the curacy of the said chapel.

The plaintiffs then averred, that, on the 18th *March*, 1805, the chapel became vacant by the death of one *John Hastwell*, clerk, theretofore curate and minister thereof; and that, thereupon, on that day, *the major part of the owners* of the said messuages, lands, and tenements, did nominate, elect and choose one *Edward Cleasby*, clerk, to be curate of the said chapel, in the room and place of the said *John Hastwell*, and did present the said *Edward Cleasby* to the bishop for the time being of the said diocese, to be by him licensed to the said curacy, and required the said bishop to license the said *Edward Cleasby* to the said curacy; and that the bishop, in pursuance of the said nomination, election, and choice of *the major part* of the said owners of the said messuages, lands, &c., as aforesaid, and in pursuance of the said presentment and request so made to him as aforesaid, did license the said *Edward Cleasby* to be curate of the said chapel, and that he was licensed accordingly, and was, from thence, until the time

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of his death, the lawful and rightful curate of the said chapel; that, on the 26th *May*, 1828, the said *Edward Cleasby* died, and thereupon the said chapel became and was, and yet is vacant;—that, at the time of the death of *Cleasby*, and at the time of the election, nomination, and choice in this count hereinafter mentioned, the plaintiffs were the *major part of the owners* of the messuages, lands and tenements within the said chapelry, and thereupon, afterwards, to wit, on the 30th *September*, 1828, they, the plaintiffs, so *being the major part* of the owners of the said messuages, &c., &c., and the said chapel being so vacant as aforesaid, did nominate, elect, and choose one *Isaac Mossop*, clerk, being a fit and proper person for that purpose, and in holy orders, to be curate of the said chapel, in the place of the said *Edward Cleasby*, and presented the said *Isaac Mossop* to the first-named defendant, he then being bishop of *Chester*, and by whom *Mossop* ought to have been licensed to the curacy of the said chapel. Nevertheless, that the defendants *Hudson* and *Airey* unjustly hindered and prevented the said bishop from licensing *Mossop* to the curacy, and that the bishop unjustly refused to do so.

The plaintiffs, in the second count, alleged, that, whenever the chapel became vacant, *the major part* of the owners of the messuages, &c., &c., had been used and accustomed to elect, nominate, and choose a curate, and to present him to the vicar for the time being of the parish church of *Kendal*, for his approval, to be by such vicar presented to the bishop to be licensed.

In the third count, the plaintiffs averred, that the *owners* of the messuages, &c., were accustomed to elect a curate, and present him to the bishop to be licensed:—and the fourth count contained an allegation, that the *owners* of the messuages had been accustomed to elect and nominate a curate, and to present him to the vicar for his approval, as in the second count.

The bishop pleaded the usual plea of disclaimer.

The two other defendants, as to the first count, pleaded—*first*, that *the major part of the owners* of the said messuages, lands, &c., in that count mentioned, whenever the chapel became vacant, had not, in respect of those messuages, &c., &c., and in respect of the payments so charged upon them, been used and accustomed to elect, nominate, and choose a curate, and to present him to the bishop of the diocese, for the purpose of being licensed to the curacy of the said chapel—*secondly*, that the plaintiffs were *not the major part* of the owners of the said messuages, &c., at the time of the election, nomination, and choice in that count mentioned—*thirdly*, as to the second count, that the major part of the owners of the messuages in that count mentioned had not been accustomed to elect a curate, and present him to the vicar for his approval, and to be by him presented to the bishop for the purpose of being licensed—*fourthly*, as to the second count, that the plaintiffs were not the major part of the owners of the messuages, &c., at the time of the election, nomination, and choice in that count mentioned—and *lastly*, that the plaintiffs did not present the said *Isaac Mossop* to the defendant *Hudson*, he being the vicar of *Kendal* for the time being, for his approval, and for the purpose of being presented by him to the bishop, to be licensed to the curacy of the said chapel.

There were similar pleas to the third and fourth counts. The plaintiffs, by their replication, took issues on all the pleas.

At the trial, before Mr. Justice *Littledale*, at the last Assizes at *Lancaster*, it appeared that the repairs of the chapel had not been paid for by the owners, or major part of the owners of the messuages and lands within the chapelry, as alleged in the declaration, but that, in some of the townships, such repairs had been paid for out of the poor rates, and, in one township, by a separate as-

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sessment; and also, that the salary of the curate had been in some instances paid by certain individuals, and not by the owners of the messuages, or the major part of them, as stated in the declaration:—upon which it was submitted for the defendants, that those allegations were not proved, and that the discrepancy of proof between the declaration and evidence was a variance. The learned Judge, however, would not stop the cause, but reserved to the defendants leave to move the Court to enter a nonsuit. The plaintiffs then gave evidence of the custom for the major part of the owners of the messuages to nominate a curate and present him to the bishop; but they only proved that it had been done in three instances—*first*, in the year 1695; *secondly*, in 1742; and *lastly*, in *March*, 1805. In other cases, the major part of the inhabitants of the chapelry had nominated the curate, and presented him to the vicar for his approval, who presented him to the bishop, to be licensed. The learned Judge told the Jury, that, by the common law, the rector or vicar had a right to nominate the curate, but that the plaintiffs in this case insisted, that, by immemorial custom, they had a right to nominate the curate and present him to the bishop, to be licensed, without the concurrence or approval of the vicar; and he eventually left it to the Jury to say, whether the owners, or the *major part* of the owners of the messuages and lands within the chapelry, had from time immemorial nominated to the curacy, without the interference or approval of the vicar; and he observed, that the evidence adduced by the plaintiffs in support of such custom was extremely weak, as it only appeared to have been exercised in three instances. The Jury found, that the right of nomination, in regard to the chapelry of *Grayrigg*, was in the landowners, subject, however, to the approval of the vicar of *Kendal*. The verdict was accordingly entered for the defendants on the first and third issues, and for the plaintiffs on the second and fourth; and the Jury were dis-

charged as to the fifth: the plaintiffs' counsel acknowledging that the verdict entered on the issues found for them could not be supported, if the custom to nominate the curate by the land-owners, without the approval of the vicar, had not been sufficiently established by evidence; or if the alleged variance as to the payment for the repairs of the chapel should be deemed by the Court to be a fatal variance.

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Mr. Serjeant *Wilde*, in the last term, accordingly obtained a rule *nisi* that the *postea* might be amended, by entering a discharge of the Jury on the issues found for the plaintiffs, as being immaterial after the issues found for the defendants; or, that a nonsuit might be entered, according to the leave reserved at the trial.

Mr. Serjeant *Jones* now shewed cause.—The plaintiffs claimed a general right to elect and nominate a curate to the chapelry, in case of a vacancy, and to present him to the bishop of the diocese, independently of the control or approval of the vicar; if not, they insisted on a limited or qualified right to nominate the curate, and present him to the vicar for his approval, who was to present him to the bishop; and although the general right in the land-owners to nominate and present to the bishop has been negatived by the finding of the Jury, yet the two issues found for the plaintiffs are not immaterial, as they establish a qualified right for the major part of the owners to nominate the curate, and present him to the vicar for his approval. This case, therefore, differs from that of *Powell v. Sonnett* (a), where, in *assumpsit*, a verdict was entered for the plaintiff on some counts of the declaration, and the Jury were discharged from finding any verdict on the others; yet the issues applicable to the latter counts were wholly immaterial; and here,

(a) 11 B. Moore, 330; S. C. 3 Bing. 381.

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although the Jury were discharged as to the fifth issue, *vis.* that the plaintiffs did not present the curate they had nominated to the vicar for his approval, yet they might at another time be enabled to prove that they had done so, in which case, the verdict found for them on the issues shewing their right to nominate the curate would be most material. Although the Jury may be discharged from finding a verdict on immaterial issues at *Nisi Prius*, yet it can only be done by consent of the parties at the trial, and the consent must appear upon the face of the record. At all events, the Court in *Banc* have no power to do so; and it is quite clear that a nonsuit cannot be entered, after a verdict found for the defendants upon any one issue in the same record.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—If the verdict had been for the defendants generally, I admit the proposition that a nonsuit could not be entered; but it is otherwise, where the finding of the Jury goes to a part only; and here they found that the plaintiffs had only a limited right to nominate the curate, *vis.* that the right of nomination, in regard to the curacy of the chapel of *Grayrigg*, was in the landowners, subject, however, to the approval of the vicar of *Kendal*:—and the right of nomination was the main point discussed at the trial. Besides, the verdict on the issues found for the plaintiffs was subject to leave to move to enter a nonsuit, to which the plaintiffs' counsel acquiesced. Formerly, a plaintiff in *quare impedit* was not allowed to have more than one count in the declaration, and the introduction of two or more is of very modern date, and in this case has created the difficulty the plaintiffs labour under. And the learned Judge who tried the cause has reported to us, that he does not think that the plaintiffs adduced sufficient evidence to support the custom to nominate the curate

without the approval of the vicar. We think so too; and as leave was reserved to enter a nonsuit, with the express concurrence of counsel, it is but just that the plaintiffs should waive the verdict found for them on two issues which may be considered as immaterial, after the verdict for the defendants, as the issues found for the plaintiffs only gave them a qualified right, as owners of lands within the chapelry, to nominate a curate, subject to the approval of the vicar.

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Mr. Justice GASELEE (a).—If leave to enter a nonsuit be reserved by the Judge on a doubt he may entertain at the trial, as to an alleged variance between the declaration and evidence, there can be no question but that the Court may determine whether it ought to be entered or not; but here, the plaintiffs' counsel assented to a motion being made for a nonsuit: and as the learned Judge who tried the cause now says that he did not think that the plaintiffs made out their right to nominate the curate, as they did not adduce sufficient evidence to support the general custom to present to the bishop without the approval of the vicar, I concur with my Lord Chief Justice, that a nonsuit must be entered.

Mr. Justice BOSANQUET.—I am also of opinion that a nonsuit ought to be entered, according to the reservation of the learned Judge, and the acquiescence of the plaintiffs' counsel at the trial. I am surprised at the introduction of several counts in a declaration in *quare impedit*, as it is in the nature of a real action, and the judgment being *in rem*.

Rule absolute for a nonsuit.

(a) Mr. Justice Park was at Chambers.

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The plaintiff having signed interlocutory judgment in a county court for want of a plea, and given the defendant notice of executing a writ of inquiry, the defendant, on the day previously to its execution, sued out a writ of *pone* to remove the cause into this Court:—
Held, to be regular, as the cause might be removed at any time before the Sheriff's Jury were sworn; and the Court refused to award a *procedendo*.

GODLEY v. MARSDEN.

THE plaintiff sued out a writ of *justicies* against the defendant in the county court of *Yorkshire*, returnable on the 26th *August* last. A declaration was filed in due course, and the defendant having suffered judgment by default, the plaintiff, in *October* following, signed interlocutory judgment for want of a plea, and gave the defendant notice that a writ of inquiry would be executed on the 18th *November*; and, on the plaintiff's attorney attending on that day, the attorney for the defendant tendered to him a writ of *pone* to remove the proceedings into this Court, which writ had been obtained by the defendant on the preceding day, *viz.* the 17th *November*.

Under these circumstances:—

Mr. Serjeant *Jones*, on a former day in this term, obtained a rule *nisi* that a writ of *procedendo* might issue, on the ground that the writ of *pone* had been sued out too late, the plaintiff having previously signed interlocutory judgment for want of a plea.—The statute 19 *Geo.* 3, c. 70, s. 4, applies only to the removal of judgments from inferior Courts of record. In the case of *The King v. North* (a), where the defendant was indicted before Justices of the Peace, and pleaded not guilty; and, after the Jury had gone out to consider their verdict, he delivered in a *certiorari*, and the Justices returned the verdict, it was held well, as it was too late to deliver the *certiorari* after the Jury were sworn. The decision in that case is in conformity with the statute 43 *Eliz.* c. 5. In the case of *The King v. The Inhabitants of Seton* (b), the Court of *King's Bench* quashed a writ of *certiorari* which had been issued before, but not served until after judgment on an indictment

(a) 1 Salk. 144.

(b) 7 Term Rep. 373.

for not repairing a road; on the ground, that, after judgment, the record can only be removed by a writ of error; and, in the late case of *Walker v. Gann* (a), where, in an action brought in the Forest Court of *Knarborough*, the defendant suffered judgment by default, and afterwards sued out a writ of *certiorari* to remove the cause into the Court of *King's Bench*, it was held, that the *certiorari* was too late, and that Court made a rule for a *procedendo* absolute; and Mr. Justice *Bayley* said: "The general rule is, that, after judgment, *certiorari* does not lie;" and Mr. Justice *Hobroyd* said: "I think it is a sound and wholesome general rule, that a cause shall not be removed from an inferior jurisdiction after judgment has been signed there, and I think the rule is particularly applicable where the defendant suffers judgment to go by default in the first instance, and then applies for a *certiorari*." The same reasoning is applicable to a writ of *pone*. The statute 21 *Jac.* 1, c. 23, is also confined to inferior Courts of record, and, therefore, the writ of *procedendo* ought to go.

Mr. Serjeant *Cross* now shewed caused.—A writ of *certiorari* or *pone*, to remove a cause from a Court of record or county court, may be sued out at any time before the cause is finally determined; and it has been expressly decided that the statute 21 *Jac.* 1, c. 23, does not extend to the case of an interlocutory judgment, and that a *certiorari* may be issued at any time before the Jury are sworn (b); and, in *Bevan v. Prothesk* (c), the Court held, that the delivery of a *recordari facias loquelam* to the clerk of a county court, after interlocutory judgment, and before final judgment, was a stop to all further proceedings in that court. That case is expressly in point. In *Lee v. Goodlad* (d), the Court awarded a *procedendo*, because the

(a) 7 Dow. & Ryl. 769.

(c) 2 Burr. 1151.

(b) See Tidd's Prac. 9th edit.

(d) 4 Dow. & Ryl. 350.

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defendant made default in not entering into the recognizance required by the statute 51 *Geo. 3*, c. 124, s. 3. But there interlocutory judgment had been signed against the defendant, and the plaintiffs were about to assess their damages, as in this case, when the defendant's attorney lodged a writ of *certiorari*, which was allowed, and no objection was raised as to its being lodged too late. So, in *Attenborough v. Hardy* (a), interlocutory judgment was signed against the defendant, and the usual notice given for executing a writ of inquiry, and in the meantime he sued out a *habeas corpus cum causa* for the removal of the action into the Court of *King's Bench*, yet no objection was made, that the writ had not been sued out in time. These cases are authorities to shew, that, in an inferior Court of record, a writ of *certiorari*, and, in the county court, a writ of *pone*, may be sued out by the defendant at any time before final judgment signed, or, at all events, before the Jury are sworn.

Mr. Serjeant *Jones*, in support of his rule.—Although a writ of *pone* may have the effect of staying the proceedings in the Court below, according to the case of *Bevan v. Prothesk*, yet it is competent to the Court above to award a *procedendo*, if the justice of the case requires it. The cases of *Lee v. Goodlad* and *Attenborough v. Hardy* do not apply, as there the Court granted a *procedendo* on the grounds, that, in the one case, the defendant had not entered into the recognizance directed by the statute 51 *Geo. 3*, c. 124, and, in the other, that he had not given the recognizances required by the statute 19 *Geo. 3*, c. 70. Here, however, no recognizance was necessary, as the action was brought in the county court; and *Walker v. Gann*, which is the latest decision on the subject, is expressly

(a) 4 Dow. & Ryl. 362.

in point to shew that a writ of *certiorari* does not lie to remove a cause from an inferior Court after judgment signed there, the defendant having previously let judgment go by default.

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Lord Chief Justice TINDAL.—I think that this rule must be discharged. The case of *Walker v. Gann* does not appear to me to apply, as there the defendant had not only let judgment go by default, but a writ of inquiry was executed, and a verdict found for the plaintiffs by the Sheriff's Jury, immediately *after which finding* the writ of *certiorari* was served. That was clearly too late, as nothing remained to be done in the Court below but the mere form of entering up final judgment. Here, however, the plaintiff had only signed interlocutory judgment for want of a plea, and *the day before* the writ of inquiry was to be executed, the writ of *pone* had been sued out by the defendant. The case of *Bevan v. Prothesk* seems to me to be in point; and in *Cox v. Hart (a)*, the Court refused a *procedendo*, although a writ of *habeas corpus cum causa* had not been delivered till after an interlocutory judgment had been signed in the Court below, and notice given of executing a writ of inquiry; and it is there stated, that the practice was, to allow the *habeas corpus*, provided it were delivered at any time before the Jury was sworn. That case seems to me to be conclusive of this question.

Mr. Justice PARK.—This case is altogether distinguishable from that of *Walker v. Gann*, as there the writ of inquiry had been executed, and the Jury had assessed the plaintiff's damages before the writ of *certiorari* was served. Nothing, therefore, remained to be done in the Court below but the entering up final judgment, which was a mere

(a) 2 Burr. 758.

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matter of form. The cases cited from *Burrow*, particularly that of *Cox v. Hart*, referred to by my Lord Chief Justice, appear to me to be expressly in point.

Mr. Justice GASELEE.—Although in *Wyatt v. Markham* (a), where a *habeas corpus* to remove a cause after interlocutory judgment signed in an inferior Court, was considered by the Court above to be too late, and they ordered a *procedendo*; yet, in the subsequent case of *Cox v. Hart*, the contrary was held, and from which it appears that the practice in proceeding on the statute 21 *Jac.* 1, c. 23, is, to allow the *habeas corpus* or *certiorari* in like manner as upon the 43 *Eliz.* c. 5, provided the writ be delivered at any time before the Jury are sworn; and here, the *pone* was sued out the day before the writ of inquiry was to have been executed.

Mr. Justice BOSANQUET concurring—

Rule discharged.

(a) Barnes, 2nd Edit. quarto, 221.

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Thursday,
Feb. 11th.

GRYMES v. BOWEREN.

THIS was an action on the case, and brought against the defendant, for an alleged injury to the plaintiff's reversionary interest in certain premises, by the removal of a pump.

A pump erected by a tenant, and so fixed as to be removable without injury to the freehold, may be taken away by him at the expiration of his term, as being an article of domestic use or convenience.

At the trial, before Mr. Baron *Garrow*, at the last Assizes at *Norwich*, it appeared that the defendant occupied a cottage belonging to the plaintiff, as a yearly tenant, and that, when the tenancy commenced, there was a well on the premises, from which the water was drawn by a bucket; that the defendant, for the more convenient use of the well, arched it over with brick, and erected a pump at his own expense, which was fastened or attached to a board or plank placed perpendicularly, the bottom of which rested on the ground, and the top was fastened to a wall, about four inches distant, by an iron bolt or pin, which had a head on the side of the board nearest the pump, and a nut and screw at the other end, on the opposite side of the wall, through which the bolt passed. The tube of the pump passed through the brick-work into the well. The tenancy was determined by a regular notice to quit; and the defendant, on leaving the premises, removed the pump entire; in doing which, a few of the bricks which covered the well were displaced, but the iron pin which attached the board to the wall was left in the wall, the board only being taken away, and the well might have been used as it had been before the pump was erected. The learned Baron was of opinion that the pump was parcel of the freehold, as it could not have been made the subject of larceny at common law; and, under his direction, the Jury found a verdict for the plaintiff, damages 4*l.*, leave being reserved to the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion that he had a right to remove the pump.

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Mr. Serjeant *Wilde*, in the last term, accordingly obtained a rule *nisi*, on the grounds that, as the pump had been removed entire, without occasioning an actual damage to the premises, and none of the bricks had been taken away, and the well might be used as it had been before the erection of the pump, the action could not be maintained; and also that the direction of the learned Judge to the Jury was wrong in point of law.

Mr. Serjeant *Storks* now shewed cause.—The learned Baron, who tried the cause, thought that, under the circumstances, the pump in question was affixed to the freehold, and the Jury coincided with him in that opinion. The general rule as between landlord and tenant is, that, whatever is fixed to the freehold, cannot be removed by the tenant, without subjecting himself to the consequences of an action for waste. All the authorities on this subject are collected in *Elwes v. Maw* (a), and a distinction was there taken between annexations to the freehold, for the purposes of trade, and those made for the purposes of agriculture and the better enjoyment of the immediate profits of the land; and Lord *Ellenborough*, after referring to the doctrine laid down by Lord *Holt* in *Poole's case* (b), said (c): “The indulgence in favour of the tenant for years, during the term, has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier glasses, hangings, wainscot fixed only by screws, and the like.” The exceptions, therefore, to the general rule, that whatever is once annexed to the freehold can never be severed without the consent of the owner of the inheritance, seem to be confined to erections or fixtures for the purposes of trade, or matters of ornament; and the pump in question was not erected for either of those purposes,

(a) 3 East, 38.

(b) 1 Salk. 368.

(c) 3 East, 53.

but for the general convenience of the tenant, and it was essential to the occupation of the premises. Although, in *Penton v. Robart*, Lord *Kenyon* expressed an opinion (a), that gardeners and nurserymen, in the neighbourhood of the metropolis, might remove green-houses and hot-houses, which they had erected; yet, in *Buckland v. Butterfield* (b), where a conservatory was erected upon a brick foundation, and affixed to, and communicating with rooms in a dwelling-house, it was held, that it could not be removed by a tenant who had erected it during his tenancy, although he had the reversion in fee of the premises after the death of the lessor.

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Mr. Serjeant *Wilde*, in support of his rule.—In all cases, as between landlord and tenant, where questions arise respecting the right to what are ordinarily called fixtures, the greatest latitude and indulgence have been allowed in favour of the claim of the tenant, against that made by the landlord in respect of his freehold or inheritance; and custom has now introduced another exception to the general rule; for besides things affixed for the purposes of trade or ornament, any articles of general utility and common domestic convenience, such as coppers, ovens, stoves, grates, bells, and the like, may be removed by the tenant during the term. The pump in question falls within that exception. It is true that it might have been so attached to the freehold as to cause an injury by its removal, in which case the tenant would not have a right to take it away; but the pump was not even fastened against the wall, and the only injury the plaintiff could have sustained, was by driving the pin through the wall, and which the defendant left. Although the pump was of small value, the rule of law equally applies as if it were one of the most costly description; and an article must be

(a) 2 East, 90.

(b) 4 B. Moore, 440; S. C. 2 Brod. & Bing. 54.

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so fastened to the freehold as to cause a detriment to it by the removal. Here, however, no material injury was done to the plaintiff's reversionary interest; and the case is altogether distinguishable from that of *Buckland v. Butterfield*, as there the conservatory was attached to the dwelling-house, and heated by a flue communicating with the chimney of the dining-room; and as a cider-press or steam-engine has been held to be removable by a tenant, at the expiration of his term, so may a pump, provided the removal cause no immediate or essential injury to the freehold or inheritance.

Lord Chief Justice TINDAL.—It is extremely difficult to draw a general, and at the same time to lay down any precise or accurate rule on this subject. Each case must depend upon its own peculiar circumstances, and the nature of the article, as well as the object of setting it up, and the mode or degree of firmness with which it is affixed, must be taken into consideration. The pump, as described to have been fixed in this case, appears to me to fall within that class of fixtures which are removable, as between landlord and tenant. More latitude has always been given, and a greater indulgence shewn, to a tenant for years, than in a case between an heir and an executor, or the executors of tenant for life or in tail, and the remainder-man or reversioner. It has been decided, that a tenant for years may remove articles of ornament during the term, although affixed to the freehold, such as ornamental grates, stoves, marble chimney-pieces, pier-glasses, wainscots fixed by screws, and the like. So, coppers, ranges, ovens, and various other articles of that description, have, upon a change of occupiers, been usually allowed by landlords to be valued by the outgoing to the incoming tenant, or sold by the former; and, in many cases, the landlord himself becomes a purchaser. Looking, then, at the facts of this case; considering that the pump was an article of domestic convenience; that it was slightly affixed to the freehold, and removed without do-

ing it any material injury; that it was erected by the tenant, and might be taken away entire; I think, that, as between landlord and tenant, the latter had a right to remove it, and, consequently, that this verdict cannot be supported.

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Mr. Justice PARK.—The rules with regard to property of this description vary according to the relation in which parties stand towards each other. In cases as between an heir-at-law and an executor, the rule obtains with the utmost rigour in favour of the inheritance. But the greatest latitude has always been shewn, and indulgence given to a tenant for years, who claims what are ordinarily called fixtures, as against his landlord. Although, in the Year Book, 21 *Hen.* 7, 27, it appears that the rule in favour of tenants was narrowed, by only allowing a lessee for years to remove, within the term, things fixed to the ground, and not to the walls of the principal building, yet Lord *Hardwicke*, in *Lawton v. Lawton*(a), said, “What would have been held to be waste in *Henry* the Seventh’s time, as, removing wainscots fixed only by screws, and marble chimney-pieces, is now allowed to be done. Coppers, and all sorts of brewing vessels, cannot possibly be used without being as much fixed as *fire-engines*, and in brewing-houses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them.” Perhaps, in a case of this description, we ought not to measure too nicely the mode in which the article is fixed, but we must look at the nature of the article itself. It appears, that ovens, coppers, ranges, and other articles used for domestic purposes, have been held to be removable by a tenant, before or at the expiration of his term. This, therefore, makes the

(a) 3 Atk. 15.

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present case distinguishable from that of *Buckland v. Butterfield*, where the conservatory was not only deeply fixed in the soil, but in fact formed part of the dwelling-house to which it was attached. Here, however, the pump was not so fixed but that it might be removable by the defendant during his tenancy; and however much I regret it, as the article in dispute is of so trifling a value, I am compelled to say, that I think the verdict was wrong.

Mr. Justice GASELEE.—I entirely agree with my Lord Chief Justice and my brother *Park*, and hope, for the sake of both parties, that all further litigation between them may now be put an end to.

Mr. Justice BOSANQUET.—I am also of opinion that the pump in question was removable by the defendant. In the case of landlord and tenant, the rule as to what articles shall be deemed fixtures, has not been so strict as in the case of an heir and an executor, or the executors of a tenant for life and the remainder-man; and the Courts have always inclined to favour a tenant for years. The only apprehension I have felt in this case was, that we might possibly lay down a principle which might infringe on the general rule, or add to the exceptions already made to it. But, considering that this is a case between landlord and tenant; and that the pump was erected by the latter for a domestic purpose, and removed by him entire, and without doing any material injury to the freehold, or the plaintiff's reversionary interest, I think we shall violate no principle of law by saying, that, under those circumstances, the defendant had a right to remove it. The rule for setting aside the verdict must therefore be made—

Absolute.

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GODEFROY v. DALTON, Gent., One &c.

Friday,
Feb. 12th.

THIS was an action of *assumpsit*, and brought against the defendant, an attorney of this Court, for alleged negligence in the prosecuting and conducting an action brought by the plaintiff against one *Cyrus Jay* and his partner *Byles*, for negligence as attorneys in conducting the defence of the plaintiff in an action brought against him by one *Dubois*.

The first count of the declaration stated, that whereas, before the making of the promise and undertaking of the defendant thereafter next mentioned, a certain action had been commenced and prosecuted by and at the suit of *Stephen Dubois* against the plaintiff, in the Court of our Lord the King, before the Justices of our said Lord the King of the *Bench*, at *Westminster*, in the county of *Middlesex*, for a certain cause of action alleged to have accrued to the said *Stephen Dubois* against the plaintiff, and the plaintiff had retained and employed one *Cyrus Jay* and *Mather Byles*, as his attorneys, for certain fee and reward to be paid to them by the plaintiff in that behalf, they, the said *Cyrus Jay* and *Mather Byles* (then and there being attorneys of the said Court of our said Lord the King of the *Bench*, at *Westminster* aforesaid), as such attorneys, to defend the said action for the plaintiff; and the said *Cyrus Jay* and *Mather Byles* had undertaken such defence for the plaintiff, and such proceedings were thereupon had in the same Court in the said action, that it was considered and adjudged by the same Court that the said *Stephen Dubois* should recover against the plaintiff the sum of 30*l.* 10*s.* of lawful money of *Great Britain*,

In an action against an attorney for negligence in the prosecution of a former action brought by the plaintiff against two other attorneys (partners) for negligence in conducting the defence of the plaintiff in an action which had been previously brought against him, and in which the declaration alleged, that, in consequence of the negligence of those attorneys, judgment by default had been signed against the plaintiff, and such further proceedings had, that final judgment was afterwards signed, and execution issued against him; and the defendant in that action only produced the Prothonotaries' book, in which all judgments by default were entered, in proof of that allegation, and the plaintiff was nonsuited, upon which he commenced an action against

the defendant for not having procured proper evidence of that judgment:—*Held*, that as it was not a direct allegation of a judgment on record, with a plea distinctly putting it in issue;—the not producing the record of the judgment was not such a want of skill or diligence, or gross negligence, by the defendant, as to make him answerable to the plaintiff.

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which said sum of 30*l.* 10*s.* the plaintiff had been forced and obliged to pay, and had paid, to the said *Stephen Dubois*, in satisfaction of the said judgment, and had been desirous of commencing and prosecuting a certain action against the said *Cyrus Jay* and *Mather Byles* for negligence in conducting his said defence for the recovery of the said sum of 30*l.* 10*s.* so paid to the said *Stephen Dubois* as aforesaid; of all which said several premises, the defendant, before the making of his said promise and undertaking thereafter next mentioned, had notice, to wit, in the county of *Middlesex*:—and thereupon, theretofore, to wit, on the 1st *June*, 1827, to wit, at &c. aforesaid, in consideration that the plaintiff, at the special instance and request of the defendant, would retain and employ him, the defendant, as his attorney, for certain fee and reward, to be thereupon paid by the plaintiff to the defendant in that behalf, to prosecute and conduct the said action of him, the plaintiff, against the said *Cyrus Jay* and *Mather Byles*, the defendant undertook, and then and there faithfully promised the plaintiff, to *prosecute and conduct the said last-mentioned action, in a proper, skilful, and diligent manner*.—The plaintiff then averred, that he, confiding in the said promise and undertaking of the defendant, and in hopes of his faithful performance thereof, did afterwards, to wit, on &c. aforesaid, at &c. aforesaid, retain and employ the defendant as such attorney as aforesaid, to prosecute and conduct the said last-mentioned action, on the terms aforesaid; and the defendant then and there accepted the said retainer and employment, and under and by virtue thereof the defendant, afterwards, to wit, in *Trinity* term, in the seventh year of the reign of our said Lord the King, as the attorney of and for the plaintiff, commenced an action at the suit of the plaintiff, against the said *Cyrus Jay* and *Mather Byles*, in the said Court of our said Lord the King, before the Justices of our said Lord the King of the *Bench*, at *Westminster*, for the pur-

pose aforesaid; and afterwards, to wit, on &c., aforesaid, at &c., aforesaid, the said *Cyrus Jay* and *Mather Byles* appeared and pleaded to the said action, and issue was joined thereupon; and that afterwards, to wit, on the 18th *December*, in the year aforesaid, to wit, at &c. aforesaid, the said last-mentioned cause came on for trial in the said Court of our said Lord the King of the *Bench*, before the honourable Sir *James Burrough*, Knt., in the absence of the right honourable Sir *William Draper Best*, Knt., his Majesty's Chief Justice of the said Court of the *Bench*, he, the said Sir *James Burrough*, being then and there one of the Justices of the *Bench*, and was then and there tried before the said Sir *James Burrough*. And although it was then and there the duty of the defendant, under and by virtue of his said retainer, and his said promise and undertaking, to have had, in the said Court of our said Lord the King of the *Bench*, at the trial of the said last-mentioned action, evidence of the said judgment in the said first-mentioned action against the plaintiff, at the suit of the said *Stephen Dubois*, in order that it might then and there have appeared to the said Court of our said Lord the King of the *Bench*, that judgment had been obtained by the said *Stephen Dubois* against the plaintiff, in the said first-mentioned action, for the said sum of 30*l.* 10*s.*, whereof the said defendant had notice: nevertheless, the defendant, not regarding his said promise and undertaking, but contriving, and fraudulently intending, to injure the plaintiff in this respect, did not, nor would, prosecute the said last-mentioned action, in a proper, skilful, and diligent manner, but, on the contrary thereof, wholly neglected and omitted to have proper evidence of the said judgment in the said first-mentioned action, ready to produce to the said Court of our said Lord the King of the *Bench*:—that, by reason thereof, he, the plaintiff, was then and there wholly unable to prosecute his said action against the said *Cyrus Jay* and *Mather Byles* with effect, and was then

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and there compelled to suffer himself, the said plaintiff, to be nonsuited in the said last-mentioned action, whereby he, the plaintiff, was not only hindered and prevented from recovering from the said *Cyrus Jay* and *Mather Byles* the said sum of 30*l.* 10*s.* so paid to the said *Stephen Dubois* as aforesaid, in satisfaction of his said judgment, but had also been forced and obliged to pay, and had paid to the said *Cyrus Jay* and *Mather Byles* a large sum of money, to wit, the sum of 100*l.*, for their costs and charges in and about their defence to the said last-mentioned action, and had also been forced and obliged to incur a further great expense, amounting in the whole to 100*l.*, in and about the commencing and prosecuting his said action against the said *Cyrus Jay* and *Mather Byles*, to wit, at &c., aforesaid.

There were four other special counts, charging the defendant with negligence in the conduct of the action by the plaintiff against *Jay* and his partner, and the common money counts.

The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last *Trinity* Term, the plaintiff sought to recover damages from the defendant, an attorney of this Court, for negligence in the conduct and prosecution of a former action, brought by the same plaintiff against one *Jay* and his partner, who were also attorneys of this Court. The record, in the cause of *Godefroy v. Jay and another* was produced, from which it appeared that that action was brought against them for negligence, as attorneys, in conducting the defence of the present plaintiff in a former action which had been brought against him by one *Dubois*; and, in the action against *Jay* and his partner, the declaration alleged, that, by and through the neglect and default of the defendants, judgment by default had been signed against the plaintiff *Godefroy*, and such further proceedings had therein, that

final judgment was afterwards signed, and execution issued thereupon, against him, *Godefroy*. Upon the trial of that cause, before Mr. Justice *Burrough*, at *Guildhall*, at the Sittings after *Michaelmas* Term, 1827, the only evidence offered by the plaintiff to satisfy the allegation that judgment by default had been signed against him in the action brought against him by *Dubois*, was a book produced from the Prothonotaries' office of this Court, in which all judgments by default are entered and signed in each term, containing the name of the cause, and the day of the date of each entry, and the officer's fees were marked opposite to it. The learned Judge held, that this was not sufficient proof of the allegation, and accordingly directed a nonsuit (a); and the Court afterwards refused to set it aside, holding that the plaintiff should have shewn that the judgment had been completed, and which ought to have been proved by the production of the judgment roll, or an examined copy of the record (b). The present action was then commenced against the defendant *Dalton*, as the plaintiff's (*Godefroy's*) attorney, for not having been provided with the proper evidence of the judgment obtained by *Dubois*, as alleged in the declaration against *Jay* and his partner.

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At the trial of this cause, a gentleman at the bar, of considerable eminence and great experience, was called for the defendant; and who stated, that the defendant had consulted him the evening before the trial of the cause of *Godefroy v. Jay and Byles* was called on, as to the evidence it would be necessary to offer in support of the allegation that judgment by default had been signed by *Dubois* against the plaintiff; and that he (the barrister) said, that he thought at the time the production of the Prothonotaries' book would be sufficient; for that it seemed to him that negligence was the gist of the action, and that the judgment by default was only alleged as the consequence of

(a) 3 Car. & Payne, 195.

(b) 1 Moore & Payne, 239.

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such negligence.—But it did not appear whether the defendant had made any search, for the purpose of ascertaining whether or not final judgment had been entered on the roll in the case of *Dubois* against the plaintiff.

For the defendant, it was contended, that this was a question of novelty and importance, that, as he had consulted and acted on the advice of counsel, he had not been guilty of that degree of culpable negligence as to render himself liable to an action. Several objections were also taken to the declaration, which the Lord Chief Justice over-ruled, and a verdict was taken for the plaintiff, damages 77*l.*, leave being reserved to the defendant to move to set it aside and enter a nonsuit, or to arrest the judgment.

Mr. Serjeant *Taddy*, in the last term, accordingly obtained a rule *nisi*; and, in support of the nonsuit, submitted, that the defendant, in the exercise of his profession as an attorney, could only be liable for gross negligence, and not for a mere error in judgment. In *Pitt v. Yalden*, Lord *Mansfield* said (a), “That part of the profession which is carried on by attorneys is liberal and respectable, as well as useful to the public, when they conduct themselves with honour and integrity; and they ought to be protected, where they act to the best of their skill and knowledge. But every man is liable to error: and I should be very sorry that it should be taken for granted, that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover for his client from the person who stands indebted to him.”—At all events, the judgment must be arrested; for, this being an action against an attorney for negligence in the conduct of a suit, the plaintiff should have alleged that he had a good cause of

(a) 4 Burr. 2061.

action against *Jay* and his partner; but he only averred that he had been desirous of commencing and prosecuting an action against them. Neither is it alleged that *Dubois* had originally no ground of action against the plaintiff; and unless the plaintiff had a good cause of action against *Jay* and his partner, for the injury he alleged he had sustained by their suffering judgment by default to be signed in the suit brought against him by *Dubois*, he could not recover against the defendant. In *Lee v. Ayrton* (a), in an action against an attorney for suffering a debtor in custody at the suit of the plaintiff to be superseded, and the declaration stated that the debtor was indebted to the plaintiff, and it was proved that the debtor was a married woman, it was contended that this evidence shewed that the plaintiff had no cause of action against the defendant in the first action, and therefore, that he had sustained no injury by the debtor's being discharged out of custody; and Lord *Kenyon* directed a nonsuit. So, in *Aitcheson v. Madock* (b), in an action against the defendants for negligence as attorneys, in commencing an action against excise officers, for seizing a quantity of hair-powder, as the plaintiffs failed to prove that the seizure was unlawful, they were nonsuited. Lastly, as the declaration only alleged that the cause of *Godefroy v. Jay and Byles* came on for trial in the Court of our Lord the King of the *Bench*, it was insufficient, as the plaintiff should have averred that it came on for trial, and was tried, at the Sittings at *Nisi Prius*.

Mr. Serjeant *Wilde* and Mr. Serjeant *Bompas* afterwards shewed cause. First, As to the nonsuit:—although it has been said that the plaintiff did not adduce sufficient evidence to charge the defendant with negligence in conducting the cause of *Godefroy* against *Jay* and his partner *Byles*; and admitting that an attorney is not liable for a mere error in judgment, upon a doubtful or difficult point,

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(a) *Peake's Ni. Pri. Cas.* 119.(b) *Id.* 162.

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yet he must possess a reasonable degree of knowledge and skill in the practice of the Courts of which he is an officer, and of the ordinary rules of evidence, in suits which he may be retained to prosecute or defend for his clients. If an attorney act solely under the advice of his counsel, negligence cannot be imputed to him; but here the defendant, as an attorney, was bound to know that it was necessary for the plaintiff to prove that judgment by default had been signed against him in the action brought by *Dubois*; for, in the cause of *Godefroy v. Jay*, the declaration expressly alleged, that, by reason and in consequence of the negligence of the defendants, a judgment by default had been signed against the plaintiff, and such further proceedings had, that final judgment was afterwards signed, and execution issued; and if the existence of that judgment were not duly proved, the plaintiff had no cause of action against them. The entry in the book kept at the Prothonotaries' office merely shewed the names of the parties, the date of the entry of the judgment, and the fees payable to the officer; and it must therefore be considered as a mere minute kept by the Prothonotaries' clerk, as to the time when judgment was signed. But the allegation in the declaration does not merely refer to the signing of an interlocutory judgment, for it is averred that such proceedings were had in the action by *Dubois* against the plaintiff, that it was considered and adjudged by the Court, that *Dubois* should recover against the plaintiff a certain sum of money, which he had been obliged to pay in satisfaction of the judgment. The defendant, therefore, should have examined the records of the Court, for the purpose of ascertaining whether final judgment had been entered on the roll; and it is so well known and ordinary a rule of evidence, that a final judgment can only be proved by the production of the record, or an examined office copy, that it is the duty of every professional man to be acquainted with it; and the law upon the subject is clearly and expressly laid down by

Mr. *Phillipps*, in his *Treatise on Evidence*, as follows (a):
 “The final judgment of a Court is proved by an examined copy of the judgment, entered of record on the judgment roll, which is filed in the treasury of the Court. It will not be regularly proved by the judgment book of the Court; although the record of the judgment roll may not have been made up, and though the party interested in the proof of such judgment was not a party to the suit in which the judgment was obtained;” and *Ayrey v. Davenport* (b) is referred to. Besides, the defendant delayed to consult his counsel until the evening before the trial. In *Pitt v. Yalden*, the application was to the summary jurisdiction of the Court, as the plaintiff’s attorney was called upon to shew cause why he should not pay the debt and costs for not having declared against the defendant within two terms; and, although Lord *Mansfield* said, that he should be sorry that it should be taken for granted that an attorney should be answerable for every error or mistake, yet he is bound to possess reasonable skill in his business, and a sufficient acquaintance with the ordinary rules of practice and evidence, so as to protect his clients from the legal technicalities which it is the duty of the attorney to be conversant with, throughout the progress of a suit.

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As the Court gave no opinion on the objections raised to the record in arrest of judgment, it is unnecessary to state the argument as to those points.

Mr. Serjeant *Taddy* and Mr. Serjeant *Cross*, in support of the rule.—There is nothing in this case to shew that the defendant has been guilty of that degree of gross or culpable negligence as will entitle the plaintiff to sustain his verdict. The plaintiff’s charge against *Jay* and his partner was, that, through their negligence in conducting his

(a) 7th Edit. Vol. 1, 390.

(b) 2 New Rep. 474.

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defence in the action brought against him by *Dubois*, judgment by default had been signed against the plaintiff; and although it was alleged that such further proceedings were had, that final judgment was afterwards signed, yet it was only averred as a consequence of such negligence:—the gist of the plaintiff's action against *Jay* and *Byles* being the signing of the judgment by default. In *Pitt v. Yalden*, Lord *Mansfield* laid down the rule as to the protection of attorneys in the conduct of a cause in the most general and unqualified terms, *viz.* that they ought to be protected, where they act to the best of their skill and knowledge. In *Compton v. Chandless*, which was an action against an attorney for negligence in respect to an annuity which had been set aside for a defect in the memorial, Mr. Justice *Le Blanc* is reported to have said (a): “That it was not every neglect that would subject a man to such an action; that an attorney was only bound to use reasonable care and skill in managing the business of his client; that, if he were liable further, no man would venture to act in that capacity;” and in the principal case of *Baikie v. Chandless*, which was an action against the same attorney for negligence in the purchase of an annuity for another person, Lord *Ellenborough* said (b): “An attorney is only liable for *crassa negligentia*; and it is impossible to impute that to the defendant, for not discovering a defect in the memorial of an annuity, which was subsequently held to be a defect upon a very doubtful construction of the statute; I perfectly agree in the observations made on a similar occasion by my brother *Le Blanc*, and I am of opinion that the present action cannot be maintained.” Now, *crassa negligentia* can only apply to gross negligence, or ignorance of points of practice or evidence, which it is the

(a) 3 Camp. 19.

(b) 3 Camp. 20.

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pose aforesaid; and afterwards, to wit, on &c., aforesaid, at &c., aforesaid, the said *Cyrus Jay* and *Mather Byles* appeared and pleaded to the said action, and issue was joined thereupon; and that afterwards, to wit, on the 18th *December*, in the year aforesaid, to wit, at &c. aforesaid, the said last-mentioned cause came on for trial in the said Court of our said Lord the King of the *Bench*, before the honourable Sir *James Burrough*, Knt., in the absence of the right honourable Sir *William Draper Best*, Knt., his Majesty's Chief Justice of the said Court of the *Bench*, he, the said Sir *James Burrough*, being then and there one of the Justices of the *Bench*, and was then and there tried before the said Sir *James Burrough*. And although it was then and there the duty of the defendant, under and by virtue of his said retainer, and his said promise and undertaking, to have had, in the said Court of our said Lord the King of the *Bench*, at the trial of the said last-mentioned action, evidence of the said judgment in the said first-mentioned action against the plaintiff, at the suit of the said *Stephen Dubois*, in order that it might then and there have appeared to the said Court of our said Lord the King of the *Bench*, that judgment had been obtained by the said *Stephen Dubois* against the plaintiff, in the said first-mentioned action, for the said sum of 30*l.* 10*s.*, whereof the said defendant had notice: nevertheless, the defendant, not regarding his said promise and undertaking, but contriving, and fraudulently intending, to injure the plaintiff in this respect, did not, nor would, prosecute the said last-mentioned action, in a proper, skilful, and diligent manner, but, on the contrary thereof, wholly neglected and omitted to have proper evidence of the said judgment in the said first-mentioned action, ready to produce to the said Court of our said Lord the King of the *Bench*:—that, by reason thereof, he, the plaintiff, was then and there wholly unable to prosecute his said action against the said *Cyrus Jay* and *Mather Byles* with effect, and was then

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obtained a rule to shew cause why the verdict for the plaintiff should not be set aside, and a nonsuit be entered, or why the judgment should not be arrested; but as the opinion which the Court has formed upon the first branch of the rule involves the whole merits of the action, it becomes unnecessary to discuss the objection which is supposed to exist upon the record. It was an action of *assumpsit*, brought by the plaintiff against the defendant, as an attorney of this Court, for negligence in the conduct and prosecution of a former action brought by the same plaintiff against one *Cyrus Jay* and his partner; and the undertaking of the defendant is stated to be, "that he would prosecute and conduct the said action in a proper, skilful, and diligent manner." The question, therefore, upon the first branch of the rule is, whether, upon the evidence, the defendant was shewn to have failed in bringing sufficient skill and diligence to the conduct of such former cause. Now, the action against Mr. *Jay* and his partner had been brought against them for negligence as attorneys, in conducting the defence of the present plaintiff, in a former action which had been brought against him by one *Dubois*; in which action against *Jay* and his partner, it was alleged, that by reason and in consequence of their negligence as attorneys, judgment by default had been signed, and such further proceedings had, that final judgment was afterwards signed, and execution issued against *Godefroy*.

Upon the trial of the action of *Godefroy v. Jay and another*, before Mr. Justice *Burrough*, the only evidence which Mr. *Dalton*, the present defendant, had produced to satisfy that allegation was the book of the Prothonotaries of this Court, in which was kept an entry of the judgments by default, signed in each term, with the date, and the officers' fee opposite to the same; and the learned Judge who tried that cause held this proof of the allegation not to be sufficient, and nonsuited the plaintiff; which

final judgment was afterwards signed, and execution issued thereupon, against him, *Godefroy*. Upon the trial of that cause, before Mr. Justice *Burrough*, at *Guildhall*, at the Sittings after *Michaelmas* Term, 1827, the only evidence offered by the plaintiff to satisfy the allegation that judgment by default had been signed against him in the action brought against him by *Dubois*, was a book produced from the Prothonotaries' office of this Court, in which all judgments by default are entered and signed in each term, containing the name of the cause, and the day of the date of each entry, and the officer's fees were marked opposite to it. The learned Judge held, that this was not sufficient proof of the allegation, and accordingly directed a nonsuit (a); and the Court afterwards refused to set it aside, holding that the plaintiff should have shewn that the judgment had been completed, and which ought to have been proved by the production of the judgment roll, or an examined copy of the record (b). The present action was then commenced against the defendant *Dalton*, as the plaintiff's (*Godefroy's*) attorney, for not having been provided with the proper evidence of the judgment obtained by *Dubois*, as alleged in the declaration against *Jay* and his partner.

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At the trial of this cause, a gentleman at the bar, of considerable eminence and great experience, was called for the defendant; and who stated, that the defendant had consulted him the evening before the trial of the cause of *Godefroy v. Jay and Byles* was called on, as to the evidence it would be necessary to offer in support of the allegation that judgment by default had been signed by *Dubois* against the plaintiff; and that he (the barrister) said, that he thought at the time the production of the Prothonotaries' book would be sufficient; for that it seemed to him that negligence was the gist of the action, and that the judgment by default was only alleged as the consequence of

(a) 3 Car. & Payne, 195.

(b) 1 Moore & Payne, 239.

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judgment in issue; in which case of ordinary and daily occurrence, a neglect in the attorney to provide himself with regular proof of the judgment on record would have classed itself within the description of gross negligence. There is an ambiguity in the statement of the final judgment, which might lead a person not well versed in the practice of pleading, to suppose that it was only alleged as a consequential damage, and not as a direct ground of action; and, in the former case, the failure of producing the record would not have gone to the maintenance of the action. But looking more particularly to the evidence in the cause, it appears to have been proved by a gentleman at the bar, of great experience and skill, that, upon the particular allegation, he thought at the time, that the evidence offered was sufficient, for that it seemed to him that negligence was the gist of the action, and that the judgment was only alleged as the consequence. We lay no stress upon the fact, that the attorney had consulted his counsel as to the sufficiency of the evidence; because, we think, his liability must depend upon the nature and description of the mistake or want of skill which has been shewn, and he cannot shift from himself such responsibility by consulting another, where the law would presume him to have the knowledge himself. But it is from the particular nature of this misconception of the attorney, and from the evidence given in the cause, that we think the non-production of a record of judgment is not to be considered as an instance of such gross negligence, as makes the defendant answerable; and we therefore think, the rule for a nonsuit ought to be made—

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Friday,
Feb. 12th.

THIS was an action for a libel. The first count of the declaration stated that the plaintiff, for a long time before, and at the time of the composing and publishing the false, scandalous, malicious, and defamatory libel by the defendant thereafter mentioned, and before and at the time of the committing of the several grievances by the defendant thereafter mentioned, carried on the trade and business of a carpenter, builder, and surveyor, and had *been appointed the surveyor, agent, and steward of a certain company or society of persons, called the New England Company, and in such capacity, had been and was employed by the said Company*, and had always conducted himself with credit, skill, care, punctuality, fidelity, and integrity towards the said Company, and all others employing him in the way of his said trade and business, and, until the committing of the said several grievances by the defendant thereafter mentioned, had never been suspected of being guilty of any extravagance or misconduct in his said employment by the said Company, or of abusing the trust or confidence reposed in him by the said Company in his said employment, or of having made default in

In an action for a libel, the plaintiff, in the inducement to his declaration, alleged, that he had been appointed the surveyor, agent, and steward of a certain company or society of persons, called the *New England Company*; and that, in such capacity, he had been and was employed by the said Company: It was then averred, that the defendant published the libel of the plaintiff, and of and concerning his said business and employment by the Company.—It appeared in evidence, that the Company was incorporated by deed, by the name of

“A Company for establishing Christianity in *New England*, and the parts adjacent in *America*.” But as the plaintiff proved that the Company was commonly known and designated by the name of ‘*The New England Company*,’ the Court held it to be a sufficient description.—*Held*, also, that, as the inducement in the declaration contained distinct allegations that the plaintiff had been appointed the surveyor, &c. &c. of the Company, and that in such capacity he had been employed by them, and that the defendant published the libel of and concerning the plaintiff and his employment by the Company, without reference to his appointment, it was not necessary for him to prove any actual appointment to his office, either by deed, or otherwise.

The defendant addressed a letter to the treasurer of a public Company, in which he stated, that “the plaintiff was the most artful scoundrel that ever existed, and that he was in every person’s debt, and that his ruin could not be long delayed;” but the writer added, “that he had never disclosed the affair, nor ever would, except to the person to whom the letter was addressed, and a friend.”—*Held*, that the omission of the latter part of the letter, in the declaration, did not constitute a ground of variance, as the charge imputed by the letter remained the same as that which was contained in the part set out in the declaration.

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payment of the moneys due and owing from him to his several creditors, or of being in insolvent circumstances; but was of good name, fame, and credit, and was gaining great profits in his said employment by the said Company, and by his said trade and business, to the comfortable support of himself and his family, and the great increase of his riches, to wit, at *London*. Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with the said Company, and with and amongst his said employers and all his neighbours, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by the said Company, and by and amongst his employers and neighbours, and the said subjects, that he, the plaintiff, had been and was guilty of the offences and misconduct thereafter mentioned to have been charged upon and imputed to the plaintiff, and to cause the said Company to dismiss and discharge the plaintiff from their said employment, and thereby to injure the plaintiff in his said business and employment, and to vex, harass, oppress, impoverish, and wholly ruin him, the plaintiff, to wit, on the *24th October, 1827*, at *Eriswell*, to wit, at *London*, falsely, wickedly, and maliciously, did compose and publish, and cause and procure to be published, *of and concerning the said plaintiff, and of and concerning his said business and employment by the said Company, and of and concerning the said plaintiff in his said trade of carpenter, builder, and surveyor, and of and concerning such default in payment of the moneys due and owing from the said plaintiff to his said several creditors, as aforesaid, a certain false, scandalous, malicious, and defamatory libel, in the form of a letter addressed to one James Gibson, he the said James*

Gibson then and there being the treasurer of the said Company, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff, and of and concerning his said business and employment by the said Company, and of and concerning the said default in payment of the moneys due and owing from the said plaintiff to his said several creditors as aforesaid (that is to say), "I (meaning the said defendant) should have been silent, notwithstanding my (meaning his the said defendant's) anxious desire to put you (meaning the said *James Gibson*) upon your guard against the most artful scoundrel (thereby meaning the said plaintiff) that ever existed. The natural punishment of his (meaning the said plaintiff's) extravagance and misconduct is fast approaching; he (meaning the said plaintiff) is in every person's debt; his (meaning the said plaintiff's) ruin cannot be long delayed; and he (meaning the said plaintiff) is not deserving of the slightest commiseration."

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There were several other counts for oral slander, charging the defendant with having said to divers persons, that the plaintiff was cheating and defrauding the *New England Company*, in selling timber belonging to them and not accounting for it, and in defrauding the Company in bills delivered for repairs, and in various other ways.

Pleas—first, not guilty, to the whole declaration, and several pleas of justification, as to the words alleged to have been spoken by the defendant of the plaintiff, and charging him with having defrauded the Company.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last *Trinity* Term, the plaintiff called the treasurer of the *New England Company*, to prove his appointment as surveyor, agent, and steward to the Company, and that he had acted as such in the management of their estates. A charter, in the time of *Charles* the Second, by which the Company was incor-

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porated, was given in evidence, in which the Company was described as "A Company for establishing Christianity in *New England*, and the parts adjacent in *America*;" and the libel produced in support of the first count of the declaration was contained in the following letter written by the defendant, and addressed to Mr. *Gibson*, the treasurer of the Company, from whom the plaintiff received his appointment.

"My Dear Sir,—I was very sorry to find, by your letter received to-day, that you had been so uncomfortably circumstanced respecting the information I gave you previously to your leaving *Eriswell*. I fully expected our friend would have seen you soon after, or [‘I should have been silent, notwithstanding my anxious desire to put you upon your guard against the most artful scoundrel that ever existed; the natural punishment of his extravagance and misconduct is fast approaching: he is in every person’s debt; his ruin cannot be long delayed; and he is not deserving of the slightest commiseration:’] but it is my most anxious request, that this fellow’s misconduct may not entail ruin in another quarter; were I to be the cause of such disaster and destruction to so many that are innocent, I could never forgive myself; and I pledge my sacred word of honour, that, excepting to you and to our friend, I have never disclosed the affair, nor ever will. If you can inform me when our friend is to be in *London*, I will meet him, as I had much rather we talk the subject over before any steps are taken.

"It gives me much pleasure to inform you, that we have gained a very unexpected, but complete victory over *Lakenheath*, by a late decision at the Quarter Sessions. It was a very important one for our little village.

"Believe me, my dear Sir, ever yours’ most sincerely,

E. Evans."

"*Eriswell*, Oct. 24th, 1827.

"To *James Gibson*, Esq., 9, *Great St. Helen’s*, *London*."

The plaintiff then proved, that, in consequence of this letter, he had been dismissed from the employment of the Company; upon which the present action was commenced.

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For the defendant, it was contended, that the plaintiff could not be entitled to recover, upon three grounds—*First*, that the Company had not been truly described in the inducement to the declaration, because the proper name by which it was incorporated was not simply the *New England Company*, but a “Company for establishing Christianity in *New England*, and the parts adjacent, in *America*.”—*Secondly*, that as the plaintiff had alleged that he had been *appointed* by the Company as surveyor, agent, and steward of the Company, it was incumbent on him to shew an appointment by deed under their corporate seal, and that mere parol proof of the appointment was not sufficient;—and, *Lastly*, that the letter containing the alleged libel had not been truly set out in the declaration, as some material parts of it were omitted, which not only tended to qualify the part declared upon, but also shewed that the letter itself was in the nature of a confidential communication, and therefore could not be made the subject of an action.

His Lordship, however, refused to stop the cause, but left it to the Jury to say, whether, considering the situation in which the defendant stood with respect to the treasurer of the Company, at the time the letter in question was written, it was in the nature of a confidential communication? They thought not, and accordingly returned a verdict for the plaintiff, damages 150*l.*, leave being reserved to the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion that any of the objections taken at the trial were well founded.

Mr. Serjeant *Taddy*, in the last Term, accordingly ob-

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tained a rule *nisi*—*First*, as the plaintiff's discharge from the employment of the Company was the gist of the action, the Company should have been described in the declaration by the name of their incorporation in the deed; particularly, as they were incorporated by charter from the Crown;—*Secondly*, the plaintiff merely alleged in his declaration, that he had been appointed the surveyor, agent, and steward of a *certain company or society of persons*, called the *New England Company*; which does not express an appointment by a body corporate, which must be, with a very few exceptions, by deed, and under the seal of the Company. In *Randle v. Deane* (a), the following distinction is taken: "A corporation which hath a head may make a personal command without writing, but a corporation aggregate, which has no head, cannot, but must give their authority *under the seal* of the corporation; and 16 *Hen. 7. 2. b*, is referred to. But a corporation aggregate may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler; because they are officers or servants of an inferior description, and their appointment neither vests nor divests any sort of interest in or out of the corporation. *Cary v. Matthews* (b). But the appointment of a surveyor and agent is a material appointment; and the mode ought to be shewn, particularly, as the grievance or foundation of the plaintiff's charge is his being discharged from his employment as such surveyor and agent, in consequence of the alleged libel. In *Moises v. Thornton* (c), where a physician brought an action against the defendant for slandering him in his profession, and averred in his declaration, that he was a physician, and had duly taken the degree of Doctor of Physic: it was held, that the production of a *diploma*, under the seal of one of the Universities, was not of itself sufficient evidence to shew that the party named in the *diploma* was entitled

(a) 2 Lutw. 1497.

(b) 1 Salk. 191.

(c) 8 Term Rep. 303.

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to that degree. So, in *Smith v. Taylor* (a), which was also an action for words spoken by the defendant of the plaintiff in his profession of a physician; although the Court were divided in opinion, yet Mr. Justice *Chambre* said (b): "The fact of the plaintiff being a physician is the very gist of the action," and, after referring to a number of authorities, as bearing on the question, he said (c): "The qualification must arise from a *diploma*, licence, or degree, and there is no evidence in this case which would not tend to convict the plaintiff of practising without a qualification." Mr. Justice *Rooke* was also of opinion, that the *diploma* ought to have been produced. So, here, as the plaintiff's appointment was by a body corporate, it ought to have been by deed and under the seal of the Company; and the deed ought to have been produced. Lastly, there was a fatal variance between the libel as set out in the declaration, and the letter produced in evidence; for, if the whole of the letter be looked at, the objectionable part is qualified by the context, and the language of the concluding part of the letter expressly shews that it was the intention of the writer that it should be strictly in the nature of a confidential communication.

Mr. Serjeant *Wilde*, and Mr. Serjeant *Storks*, afterwards shewed cause.—The plaintiff has alleged, in the first count of the declaration, that he carried on the trade and business of a carpenter, builder, and surveyor, and had been appointed the surveyor, agent, and steward of a certain company or society of persons, called the *New England Company*, and in such capacity had been and was employed by the said Company; but that the defendant, intending to injure him in his credit, and to bring him into public scandal and disgrace with the Company and his employers, and all his neighbours, and to cause the

(a) 1 New Rep. 196.

(b) Id. 210.

(c) Id. 213.

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Company to dismiss and discharge him from their employment, published the libel in question of and concerning the plaintiff, and of and concerning his said business and employment. That discloses a sufficient cause of action, independently of the appointment by the Company. The mode of the plaintiff's appointment was therefore immaterial, for the allegations as to the appointment and the employment by the Company were distinct and substantive averments; and it was sufficient for the plaintiff to prove that he had been dismissed from his employment by the Company, in consequence of the libel. But the Company was generally known by the name of the *New England Company*, which was a sufficient designation; and it was not necessary to have recourse to the charter under which it was incorporated. In the case of *The National Bank of St. Charles v. De Bernales (a)*, where the Directors sued by the name of *The National Bank of St. Charles*, and the name or denomination given by the charter of the King of *Spain* was, *The Bank of St. Charles*, it was held to be no variance; and Lord Chief Justice *Abbott* said, he felt no difficulty, if the Jury were of opinion that *The National Bank of St. Charles* was the same as *The Bank of St. Charles*. So here, there can be no doubt but that the *New England Company* was the same Company as that described in the deed. In the case of *The Bank of St. Charles*, the directors of the Company were the plaintiffs, whilst, here, the plaintiff was not bound to inquire into the particular name of the Company, or the charter under which they were incorporated; for he did not declare on any deed or contract made between him and the Company: their name was only introduced incidentally, and if it should not be deemed sufficient to describe them by their general name, the plaintiff might be placed in great difficulty. Although it has been said that there is a variance between the libel, as set out in the de-

(a) 1 Ryan & Mood. 190; S. C. 1 Car. & Payne, 569.

claration, and the letter produced in evidence; yet the parts which were omitted in the declaration, do not qualify or alter the meaning of the part set out. The commencement of the letter merely assigned the defendant's reason for writing it, and had reference to a previous information which he had given the party to whom the letter was addressed. So, the concluding part has no bearing whatever upon the nature of the charge of which the plaintiff complains, nor does it qualify or mitigate the sting of the libel. The defendant merely stated that he had never disclosed the affair to any person but the party to whom the letter was sent, and a friend; but the letter was addressed to the treasurer of the Company, from whom the plaintiff received his appointment. It is true, that, if a plaintiff profess to set out a libel in terms, he must set out the whole of it: if a part only, and the omission of any part makes a material alteration in the sense of the part inserted, the omission is fatal; but if the part omitted do not alter the nature of the libel, it need not be set out in the declaration; for, as Mr. Justice *Bayley* said, in *Cartwright v. Wright* (a), "The case of *Tabart v. Tipper* (b) establishes, that a mere omission in setting out part of a libel is not fatal, unless the sense of that which is set out is thereby varied."

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Mr. Serjeant *Taddy* and Mr. Serjeant *Merewether*, in support of the rule. It may be admitted, that, if a corporation, who sue in their corporate character, misdescribe themselves in their declaration, the misdescription can only be taken advantage of by a plea in abatement, on the authority of *The Mayor and Burgesses of Stafford v. Bolton* (c); yet here, the name of the Company is not only mis-stated, but they have been described 'as a company or society of persons,' which applies to a private so-

(a) 5 Barn. & Ald. 617.

(b) 1 Camp. 353.

(c) 1 Bos. & Pul. 40.

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ciety or association; whereas they were proved to be a body corporate, whose rights, duties, and privileges are to be exercised in a particular manner; and the appointment by a Company, merely consisting of a number of individuals, is altogether different from an appointment by a corporation, which must be by deed, and under the seal of the Company. In the case of *The King v. Bigg*, it is said (a): "Formerly, it was held, that a corporation aggregate could not do any thing without deed (b). Afterwards, it is true, for conveniency's sake, it was allowed to act in ordinary matters without deed, as to retain a servant, cook, or butler (c), or to appoint a bailiff to take a distress (d). But, in case of any thing of consequence, or the employing any one to act on their behalf in a matter which is not an ordinary service, a corporation aggregate cannot do that without deed." In *Horne v. Ivie* (e), it was agreed, that one could not appear in an assize as a bailiff to a corporation without deed, neither can a corporation license one to take their trees without deed, nor send one to make a claim to lands: and here, the plaintiff has averred that he was appointed the surveyor, agent, and steward of the Company; it must, therefore, be inferred that he had the management of their lands. The appointment and employment of the plaintiff by the Company cannot be severed, and he has alleged that the libel was published of him, and of and concerning his business and employment by the Company. The employment must necessarily have relation to the appointment, from which it in fact emanated, and which should have been proved as alleged in the declaration. But as the concluding part of the letter containing the alleged libel was not set out in the declaration, it is a fatal variance, as the letter, when produced, shewed that the communication was in-

(a) 3 P. Wms. 423.

305.

(b) 13 Hen. 8, 12.

(d) 3 Lev. 107.

(c) Plowden, 91. b. 2 Saund.

(e) 1 Vcnt. 48.

tended to be strictly confidential. In *Tabart v. Tipper* (a), in an action for a libel upon the plaintiff in his business of a bookseller, the declaration set out the libel, which consisted of some doggerel verses in a book, which was alleged to have been published by the plaintiff; and immediately after the verses, there was a Latin quotation, which was omitted by the pleader, in drawing the declaration; and Lord *Ellenborough* said: "The libel was here set out as if it were an entire and continuous part of the book from which it was taken. But, in fact, it consisted of two separate and divided parts of the book. The declaration proposed to do one thing and did another. The more correct way would have been, to have said—'In a certain part of which said libel there was and is contained, &c.'" So, in a count, where the words "my sarcastic friend" were only introduced; and in the book produced in evidence they were "my sarcastic friend ΜΩΡΟΣ;" the omission of the latter word was held to be a material alteration of the sentence (b). So here, if the introductory and concluding parts of the letter be looked at, it is quite evident that the writer intended it to be a confidential communication, and that he was not actuated by any malicious or vindictive feeling towards the plaintiff; and in *Cartwright v. Wright* (c), where a libellous paragraph, as proved, contained two references, by which it appeared to be, in fact, the language of a third person speaking of the plaintiff's conduct, and the declaration, in setting it out, had omitted these references; it was held that these omissions altered the sense of the remainder, and that the variance was fatal, inasmuch, as the meaning of the paragraph given in evidence materially differed from that set out in the declaration. So here, the concluding part of the letter shews the intention with which it was written, and that the affair

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(a) 1 Camp. 350.

(b) Id. 353.

(c) 5 Barn. & Ald. 615.

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was to be kept a secret from every one but the party to whom the letter was addressed, and a mutual friend.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:

This was an action on the case for a libel, in which the plaintiff stated in the first count of his declaration, that, before and at the time of the publication of the libel, he carried on the trade and business of a carpenter, builder, and surveyor, and *had been appointed the surveyor, agent, and steward of a certain company, or society of persons, called 'The New England Company,' and in such capacity had been and was employed by the said Company;* and he then alleged, that the defendant, intending to cause the said Company to dismiss and discharge the said plaintiff *from their said employment, &c.*, published the libel in question, of and concerning the said plaintiff, and of and concerning his said business *and employment by the said Company*, in the form of a letter addressed to the treasurer of the said Company, containing the libellous matter following, of and concerning the said plaintiff, and of and concerning his said business *and employment by the said Company;* which libel is then set out in the declaration.

Three objections were taken at the trial:—*First*, that the plaintiff had failed in proving the inducement to his declaration; for, that the proper name of incorporation of the Company was not simply the “*New England Company*,” but, “*A Company for establishing Christianity in New England, and the parts adjacent in America;*”—*Secondly*, that, as the plaintiff alleged “*an appointment by the Company as surveyor, agent, and steward of the Company*,” he was bound to shew an appointment by deed under their common seal; and the *third* objection was upon the ground of

a variance between the libel as set out in the declaration, and as proved in evidence. With respect to the *first* objection, however, we are of opinion, that, as it was proved by the plaintiff that the Company was commonly known and designated by the name of the *New England Company*, it was a sufficient description in this case. It is not an allegation of any right to land or other property, either conveyed to, or derived from, the Company, or of any deed under their common seal; in which case, a description by their name of incorporation would undoubtedly have been necessary to enable them to take, to grant, or to charge. It is only an allegation of an employment by a Company called the *New England Company*; and as there was sufficient evidence that the Company in question was generally known by that description, we think it sufficient in this action, which is brought for a purpose collateral to any right belonging to the Company itself. As to the *second* objection, it is to be observed, that the inducement states, as separate facts, and as distinct allegations, "that the plaintiff had been appointed the surveyor, agent, and steward of the Company," and "that in such capacity he had been and was employed by the said Company;" so that the allegations of the appointment and employment stand distinct from each other; and it further appears, that, in the averment of the defendant's intention, and also of the application of the libel, the reference is made not to the appointment of the plaintiff to his office, but solely to his employment in that capacity. Even, if the declaration had alleged the libel to have been published of and concerning the appointment, and also the employment, it would have been difficult to have contended, after the decided cases (a) on this point, that the evidence as to the employment alone would not have been sufficient to sup-

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(a) See *Figgins v. Cogswell*, 3 3 Barn. & Cress. 113; S. C. 4 D. Man. & Selw. 369; *May v. Brown*, & R. 670.

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port the action; but, severed as these allegations are, and confined as the libel is to the plaintiff's employment only, we think it unnecessary to prove any actual appointment of the plaintiff to the office in question, either by deed, or otherwise. As to the *third* objection, we take the rule to be, as it is laid down in the books; that if the omission of any part makes a material alteration in the sense of the part inserted, such omission is fatal. And if, in this case, the part of the letter which had been omitted had contained any qualification of the meaning of the part set out, or, if any real substantial difference of construction would have arisen upon the whole of the letter when set out on the record, we should have held that the omission of such part constituted a variance, which might be taken advantage of by the defendant. But, upon the consideration of the whole letter, it appears to us that the charge imputed by it remains precisely the same as that which is contained in the part set out. The previous part of the letter which is omitted, merely assigns the defendant's reason for writing the letter: it has no bearing whatever upon the nature of the imputation, nor does it in any degree alter its quality or effect. If the setting out the whole letter would have enabled the defendant to have moved in arrest of judgment, no doubt, the omission of any part would have been a fatal variance. But we think, the very same libel appears from the perusal of the whole, as from the part; and the consequence is, that, although the defendant might undoubtedly avail himself of the whole of the letter as evidence for the Jury to infer the want of malice in the defendant, as was done at the trial, still, the omission of such part cannot be considered as a ground of variance. We therefore think, that the rule should be—

Discharged.

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Feb. 12th.

DOE on the Demise of HOLT and REES v. ROE.

THE lessor of the plaintiff, *Rebecca Holt*, having, in *April*, 1825, brought an action against one *Dally*, as the maker of a promissory note, payable to her order, he gave her a *cognovit* to confess judgment for 357*l.* 18*s.*, but execution was to be stayed until the month of *November* in that year. Upon an application by *Dally* for further time for payment, he, at the latter end of *November*, by indenture, demised the premises sought to be recovered by this action to Mrs. *Holt* for a term of ninety-nine years, and the deed contained a proviso for making void the indenture, upon payment of the above sum of 357*l.* 18*s.*, and interest, by instalments, without any deduction or abatement whatsoever; the first instalment to be paid in *August*, 1826. The indenture also contained a covenant by *Dally*, that, after default made in payment of the first or any of the subsequent instalments, it should be lawful for the said *Rebecca Holt* and one *Robert Rees* (a party to the deed) to enter into and upon the said demised premises, and quietly possess and enjoy the same. There was also a covenant for further assurance by *Dally*; and it was also expressed and declared, that it should and might be lawful for the said *Rebecca Holt* and *Robert Rees* to enter up judgment upon the said *cognovit* signed by *Dally*; and that such judgment, when so entered up, should stand and be as a security for payment of the said sum of 357*l.* 18*s.* with interest, and costs; and that in case default should be made in payment of that sum, or the interest, as aforesaid, or any part thereof, as in the indenture mentioned and express-

J. S. having given a *cognovit* for a certain sum, with a stay of execution, afterwards mortgaged certain premises as a security for the payment of that sum, and it was provided, that, in case of default of payment, it should be lawful for the mortgagee to issue execution on the judgment, and to levy the costs of the judgment, and all other costs and charges whatsoever attending the same. The mortgagee having levied, his right to the goods seized under the writ was disputed in an action brought against him by the assignees of the mortgagor, who had become bankrupt; and they having obtained a verdict, a new trial was granted on the application of the mortgagee, in which he succeeded, on the ground, that the mortgagor was not a trader within the bank-

rupt laws:—*Held*, that the mortgagee could not claim the costs of the first trial from the mortgagor, as costs or charges attending the judgment under the *cognovit*. The mortgagor, on the levy being made, gave the Sheriff notice that the goods seized belonged to him jointly with another person, upon which the Sheriff impaneled a Jury to determine to whom the property belonged:—*Held*, that the mortgagee was entitled to claim of the mortgagor the costs of the inquisition, if the mortgagee had paid them to the Sheriff, and the Court referred it to the Prothonotary to ascertain that fact.

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ed, it should and might be lawful for the said *Rebecca Holt* and *Robert Rees* to issue execution on the said judgment, and there-under from time to time to levy, until the whole of the said sum of 357*l.* 18*s.* and interest should be fully paid and satisfied, *together with the costs of such judgment, and all other costs and charges whatsoever attending the same.*

The first instalment, which became due in *August*, 1826, not having been paid, *Rebecca Holt*, in the month of *October* following, sued out a writ of *fiery facias*, under a judgment entered up on the *cognovit*, for 315*l.* 12*s.* 7*d.*, being the balance then remaining due to her of the above sum of 357*l.* 18*s.* The sum of 315*l.* 12*s.* 7*d.* was accordingly levied by the Sheriff, and paid over to *Rebecca Holt*. But *Dally*, on the levy being made, gave the Sheriff notice, that the goods seized under the writ belonged jointly to him and one *Deacon*, upon which the Sheriff caused a Jury to be impaneled to ascertain the fact as to whom the property belonged; and the expenses of that inquiry amounted to 20*l.* A commission of bankrupt having, about this time, been sued out against *Dally*, his assignees sued *Rebecca Holt* in the Court of *King's Bench*, for the amount of the levy on *Dally's* goods, which had been paid to her by the Sheriff; and, at the trial, the Jury found a verdict for the assignees. This verdict was afterwards set aside, and a new trial granted; and the then defendant, *Rebecca Holt*, having taken down the record by proviso, a verdict was found for her, which was afterwards confirmed by the Court of *King's Bench*, after argument on a special case, upon the ground that *Dally* was not a trader. The costs of the second trial were paid to *Rebecca Holt*, by *Dally's* assignees; but the costs of the first trial, the costs of taking down the record by proviso, and the costs of the inquiry by the Sheriff to ascertain in whom the property in the goods seized really was, which costs amounted, altogether, to 220*l.*, remained unpaid.

Under these circumstances, the lessors of the plaintiff commenced the present action, on the ground, that these costs must be considered as *costs and charges attending the judgment*, as mentioned in the deed, by which the premises in question were demised to the lessor of the plaintiff, *Rebecca Holt*, for the purpose of securing such judgment.

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Mr. Serjeant *Wilde*, on a former day in this term, on behalf of one *Ridge*, the tenant in possession, and who had entered into the usual consent rule to defend, and to whom *Dally* had conveyed the equity of redemption, obtained a rule, calling on the lessors of the plaintiff to shew cause why all further proceedings in this cause should not be stayed, and why the premises in question should not be assigned to *Ridge*, and conveyed to him at his expense, upon the ground, that the judgment sued out on the *cognovit*, and all costs attending the same, had been satisfied and discharged by the levy of the above sum of 315*l.* 12*s.* 7*d.*, and the payment of the costs of the second trial in the suit by *Dally's* assignees. The learned Serjeant submitted, that the costs of the first trial, brought by the assignees, could not be considered as part of the costs and charges attending the judgment confessed by *Dally*, the mortgagor, and entered up on the *cognovit*, because his assignees were perfect strangers to that transaction; and it ultimately turned out that they had no valid or legal claim upon *Dally's* estate and effects. With respect to the costs of the inquiry by the Sheriff, as the inquisition was taken for his own security, he alone ought to bear the expense, which he now attempts to charge on the estate of the mortgagor.

Mr. Serjeant *Taddy* now shewed cause.—The Court have no jurisdiction to stay the proceedings in this action,

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or to direct the premises sought to be recovered to be assigned to the tenant in possession; his remedy, if any, is in a Court of equity. When the Sheriff levied on *Dally's* goods, he gave him notice that they were not his property, but that they belonged to him and one *Deacon*, jointly; upon which the Sheriff most properly summoned a Jury to ascertain the truth of that fact: and as the costs attending the inquisition were incurred by the act or representation of *Dally*, the mortgagor, he is estopped from saying that such expenses were not costs and charges attending the judgment, and which the mortgagee was entitled to recover, in pursuance of, and according to the express words of the deed, which are not confined to the costs of the judgment, but include all other costs and charges whatsoever attending the same. So, the costs of the first action by the assignees were costs attending the judgment, the validity of which the mortgagor was bound to support.

Mr. Serjeant *Wilde*, in support of his rule.—The mortgage deed was executed and given as a collateral security to the judgment on the *cognovit*, and all costs and charges attending the same; and, although it may be admitted that such costs apply to the costs of the judgment and execution, yet, they cannot be extended to the costs of the inquisition by the Sheriff, after the levy was made. He directed the inquiry for his own security; and, if he felt any difficulty, he should have applied to the Court to enlarge the return to the writ. As to the costs of the first action by the assignees of *Dally*, the mortgagor, as it eventually appeared that he was not subject to the bankrupt laws, such costs were collateral only. Besides, the assignees were perfect strangers to the mortgagor, and they paid the costs of the second action. The mortgagee might have succeeded in the first, if she had shewn, as she afterwards did, that the mortgagor was not a trad-

er; and costs incurred by her own laches cannot be considered as costs attending the judgment confessed by the mortgagor.

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Lord Chief Justice TINDAL.—The main point in this case is, whether the costs of the first action brought by the assignees of *Dally*, the mortgagor, against one of the lessors of the plaintiff, as mortgagee, are costs attending the judgment, which was intended to be secured by the mortgage deed. I think they are not. That action was brought by the assignees, who were perfect strangers; and if it had been met with as good a defence at first, as it was ultimately, the question as to these costs would not have arisen. With respect to the costs of the inquisition taken by the Sheriff, I think it ought to be referred to the Prothonotary to ascertain what part of them ought to be allowed, or whether any of them should be paid by the mortgagor.

Mr. Justice PARK.—I think that the costs of the inquisition ought not to be allowed. The Sheriff should either have applied to the Court for an indemnity, or moved to enlarge the return to the writ.

Mr. Justice GASELEE.—If any part of the costs attending the Sheriff's inquisition were paid by the mortgagee, on account of the notice given by the mortgagor, I think she is entitled to recover them; but, if the expenses were incurred by the Sheriff alone, and for his own indemnity, I think she cannot claim them.

Mr. Justice BOSANQUET concurring—

Rule absolute.

The costs of the inquisition referred to the Prothonotary.

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Friday,
Feb. 12th.

BOOTH and Another v. MIDDLECOAT, sued with two
Others.

In an action of debt on a bail-bond against three defendants jointly, one of them pleaded his bankruptcy and certificate in bar, upon which the plaintiff entered a *nolle prosequi* as to him, and filed a replication as to the two others. The plaintiffs had notice that one of the defendants had become bankrupt before plea pleaded:—*Held*, that, notwithstanding, the latter was not entitled to his costs under the statute 8 *Eliz. c. 2, s. 2*,

THIS was an action of debt on a bail-bond, and brought against the defendant *Middlecoat*, as the principal, and the two other defendants, as his bail. The plaintiffs declared against the three defendants jointly, and the declaration was delivered on the 20th *May*, in the last *Easter* Term. On the 23rd, the defendants caused an appearance to be entered, upon which day *Middlecoat's* attorney gave the plaintiffs' attorneys notice that *Middlecoat* had become bankrupt, and had obtained his certificate, and that he was, therefore, no longer liable in this action. The plaintiffs, however, disregarded this notice, and took no steps to discharge *Middlecoat*, who afterwards pleaded his bankruptcy and certificate in bar, and in *Trinity* Term demanded a rule to reply; upon which the plaintiffs filed a replication as to the two other defendants, and entered a *nolle prosequi* as to *Middlecoat*, and no further proceedings were afterwards taken against him in the action. Under these circumstances—

Mr. Serjeant *Russell*, on a former day in this term, obtained a rule calling upon the plaintiffs to shew cause why they should not pay the defendant *Middlecoat* his costs of this action under the statute 8 *Elizabeth, c. 2, s. 2*, which enacts, that “if, after declaration, the plaintiff shall not prosecute his suit with effect, but shall willingly suffer the same to be delayed or discontinued, or he be nonsuited therein, the Judges, by their discretions, shall award to the defendant his costs, damages, and charges in that behalf sustained.”

Mr. Serjeant *Wilde* now shewed cause.—Although, in

Cooper v. Tiffin (a), it was held, that if the plaintiff enter a *nolle prosequi* as to the whole cause of action, the defendant is entitled to costs upon this statute; and in *Jackson v. Lady Chambers* (b), this Court decided, that, in trespass against two defendants, where one of them had suffered judgment by default, and a writ of inquiry was executed as against him, and the plaintiff entered a *nolle prosequi* as to the other, the latter was entitled to his costs; yet, in *Harewood v. Mathews and Another* (c), where, in *assumpsit* against two defendants, one of them pleaded his bankruptcy, and the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial, and obtained a verdict against the other defendant, who pleaded the general issue, the Court of *King's Bench* held, that the former defendant was not entitled to costs. That case is precisely in point, and by which the present must be governed. Here, the defendant *Middlecoat*, by pleading his bankruptcy and certificate, does not deny that he was primarily liable on the bond, as on a plea of *non est factum*; but he merely pleaded his bankruptcy as a defence arising since he incurred the obligation upon which he was sued; and this being an action of contract, he cannot be entitled to his costs as upon a *nolle prosequi*. Although a defendant, who is not discharged by discontinuance or nonsuit, may, in some cases, be within the equity of the statute of *Elizabeth*, as in *Cooper v. Tiffin*, where the defendant was an infant, and as such was not liable to an action, and, as soon as the plaintiff discovered it, he entered a *nolle prosequi*; yet, in this case, the plaintiffs did not know that *Middlecoat* had become bankrupt until after the declaration had been delivered; and he was clearly li-

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(a) 3 Term Rep. 511.

(b) 2 B. Moore, 718; S. C. 8 Taunt. 643.

(c) H. T. 56 Geo. 3, K. B.;

Tidd's Practice, Vol. 2, 9th Edit. 981.

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able on the bond before he had obtained his certificate. In *Jackson v. Lady Chambers*, the defendants were sued in an action of trespass; and Lord Chief Justice *Dallas* drew the distinction between that case and *Harewood v. Matthews*, as he said, that whether a party be a bankrupt or not, cannot be known until he has pleaded his bankruptcy; whilst the defendant in the principal case, as to whom the *nolle prosequi* was entered, was improperly made a co-defendant with the other, and which the plaintiff was fully aware of. But, here, the plaintiffs had no notice of the bankruptcy of the defendant *Middlecoat*, until they were informed of it by his attorney, which was after the appearance was entered, and subsequently to the delivery of the declaration.

Mr. Serjeant *Russell*, in support of his rule.—In *Cooper v. Tiffin*, where the plaintiff, after declaration delivered, finding that the defendant was an infant, entered a *nolle prosequi*, and prayed to be allowed his costs under the statute of *Elizabeth*, the Court said, that the case of a *nolle prosequi* could not be distinguished in reason from that of a discontinuance; for that, in the one as well as in the other, the party might afterwards commence another action for the same cause, and that the practice had been to give costs in such cases. Although, in *Jackson v. Lady Chambers*, the action was trespass, yet, in principle, it is applicable to the present; and Lord Chief Justice *Dallas* distinguished that case from *Harewood v. Matthews*, as he said, that there the plaintiff derived the information of the defendant's having become bankrupt from the defendant himself. So, here, the defendant's attorney informed the plaintiffs' attorneys that *Middlecoat* had become bankrupt, and obtained his certificate; and, as the plaintiffs afterwards compelled *Middlecoat* unnecessarily to be at the expense of pleading his bankruptcy, he is entitled to

his costs, as he clearly would have been, if he had not been primarily liable.

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Lord Chief Justice TINDAL.—I am of opinion, that this case does not fall within the terms or principle of the statute of the 8th of *Elizabeth*, c. 2, s. 2, which gives a defendant his costs, if the plaintiff, after declaration, willingly suffer his suit to be delayed or discontinued, or be nonsuited therein. Although it has been said, that in some cases a *nolle prosequi* has been held to be within the equity of the statute; yet, it is where what has been done by the plaintiff amounts to a discontinuance, or a nonsuit. Here, however, the plaintiffs had originally a joint and several cause of action against the three defendants, on a bail bond; and when they discovered that one of them had become a bankrupt, and obtained his certificate, they entered a *nolle prosequi* as to him; but, although they did so, they did not discontinue their suit against the two others. I do not dispute the authority of the case of *Jackson v. Lady Chambers*, where each of the defendants in trespass was liable to a separate action, and the one as to whom a *nolle prosequi* was entered, could not obtain costs from, or levy contribution on the other, as they were both wrongdoers. But, the case of *Harewood v. Matthews* appears to me to be precisely in point, and by which this must be governed; and although it has been said, that it was a hardship on the defendant *Middlecoat* to be compelled to put in his plea of bankruptcy, after the plaintiffs had notice of the fact, and that he had obtained his certificate; yet, as Lord Chief Justice *Dallas* said, in *Jackson v. Lady Chambers*: “Whether a party be a bankrupt or not, cannot be known until he has pleaded his bankruptcy;” and as soon as *Middlecoat* pleaded his certificate in bar, the plaintiffs caused a *nolle prosequi* to be entered as to him, but did not discontinue their suit as against the two others.

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Mr. Justice PARK.—There is a manifest distinction, where one defendant only is sued; and if the plaintiff enter a *nolle prosequi* as to him, he is entitled to his costs within the equity of the statute of *Elizabeth*. So, in trespass, as each defendant is a wrong-doer, he is severally liable; but that cannot apply to a case of a joint contract, where the defendants are jointly and severally liable; and it seems to me to be impossible to distinguish this case from that of *Harewood v. Matthews*, which lays down a true and sound principle; and all the manuscript cases collected by Mr. *Tidd* were derived from the most authentic sources, and may be considered as authorities in support of the principles for which they are introduced.

Mr. Justice BOSANQUET concurring—

Rule discharged.

Friday,
 Feb. 12th.

DOE on the several Demises of CARTHEW, YEOMAN, and
 Two Others, v. BRENTON.

The lessors of the plaintiff having brought three actions of ejectment in the Court of King's Bench, for the recovery of the same property, that Court ordered the proceedings in two of them to be stayed, upon certain terms, which were assented to by the counsel for all

THE lessors of the plaintiff, in *Hilary* Term, 1825, brought an action of ejectment in the Court of King's Bench, for the recovery of certain land, and part of a mine, and certain buildings and erections thereto belonging, called the *East Crinnis Mine*, situate in the parish of St. *Blaxey*, in the county of *Cornwall*.

The defendant *Brenton* appeared, and entered into a special consent rule, by which he agreed to defend for the mine and buildings only, and the lessors of the plaintiff

parties, and a rule was drawn up accordingly. The lessors of the plaintiff afterwards commenced an action of ejectment in this Court upon a later demise, but as they sought to recover the same property, the Court ordered the proceedings to be stayed.

obtained judgment for the land; but, by a rule of the Court of *King's Bench*, in *Michaelmas* Term, 1825, it was ordered, that, in executing the writ of possession for the land, the lessors of the plaintiff should be restrained from disturbing the defendant in the possession of the mine and buildings, and also in the use of the land, so far as the same was necessary for the working of the mine. This action not having been tried, although various proceedings relating to the same property had been taken in the mean time, the lessors of the plaintiff, in *Hilary* Term, 1829, obtained a rule *nisi*, in the Court of *King's Bench*, to rescind the rule of *Michaelmas* Term, 1825, and that the writ of possession might be executed in the ordinary form, and without limiting the plaintiffs to the terms imposed by that rule. The rule of *Hilary* Term, 1829, was, on cause being shewn in the following *Trinity* Term, discharged, on the terms, that, if the lessors of the plaintiff obtained a verdict, or the defendant obtained a verdict, on the ground only of the leave and licence of the tenant of the land, and his failing to prove a right of entry to erect the buildings independently of such leave, in either case it was to be referred to an arbitrator, to say what compensation ought to be made to the lessors of the plaintiff in the first case, for the entry and working of the mine, without the consent of the owner and occupier of the land; and in the second, for such entry and working, as an alleged injury to the reversion, if the reversioner could by law recover such compensation. In the vacation between *Easter* and *Trinity* Terms, 1829, the lessors of the plaintiff having brought two new actions of ejectment in the Court of *King's Bench*, for the recovery of the same property, the one on the demise of *Carthew* alone, and the other on a joint demise by him and several others, a rule *nisi* was obtained in that Court, calling on the lessors of the plaintiff to shew cause why they should not

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make their election to proceed in one of the said three causes, and in case they should elect to proceed in either of the two last causes, then, why the first cause should not be discontinued, and the costs of the defendant therein be paid by the lessors of the plaintiff; and, if they should elect to proceed in the first-mentioned cause, why the proceedings in the two last-mentioned causes should not be stayed. Upon shewing cause against this rule in the last *Trinity* Term, an affidavit by the attorney for the lessor of the plaintiff *Carthew* was produced, and which stated that the first-mentioned action of ejectment was brought for the purpose of trying whether his present Majesty, as Duke of *Cornwall*, and those claiming under him, had a right to enter upon certain lands, situate and being in a certain conventional tenement, within the manor of *Tewington*, parcel of the possessions of the said Duke of *Cornwall*, and to work minerals there; that the defendant *William Brenton*, who claimed such right under the said Duke of *Cornwall*, did not merely intend, on the trial of such ejectment, to confine himself to the trial of such right, but also meant to rely, by way of defence, on a leave and licence to enter on the said land, granted by the tenants of the lessors of the plaintiff in such first-mentioned action; that if such defence were set up and was successful, the consequence would be, that the said first-mentioned action would be defeated, and *Carthew* be prevented from recovering therein, although he should satisfactorily establish, on the trial of that cause, that the said right of entry was not in the Duke of *Cornwall*, or those claiming under him; that, in order, therefore, to put an end to such objection and defence, he *Carthew*, and his tenants, had, subsequently to *Easter* Term last, brought two fresh actions of ejectment, on new and different demises, and that he was willing to consent to a stay of the proceedings in the said last-mentioned actions,

provided he were allowed to amend his declaration in the first action, without payment of costs.

On the 8th *July* last, the Court of *King's Bench*, in order that justice might be done between the parties, ordered that the lessors of the plaintiff in the first action should be at liberty to add another count to the declaration, laying the demise on a later day, and that the record in such action should be amended, so as to make it consistent with the day of the demise; and that the defendant should plead, so as to take the cause down for trial at the next Assizes; that a rule for changing the venue from *Cornwall* to *Somersetshire*, and the former rule of reference, should stand; and that, if the lessors of the plaintiff should recover a verdict upon the new demise, they should be entitled to have a writ of possession, and recover possession of the premises; and if the defendant should obtain a verdict on the original declaration, he should have the costs of the action; and that, upon the above terms, the proceedings in the two last actions should be stayed. The terms of the last rule were drawn up and consented to by the counsel for both parties, and they indorsed their briefs accordingly. The venue was changed to *Somersetshire*, on affidavits, which stated, that it would be difficult, if not impossible, to procure an impartial Jury in *Cornwall*. The witnesses for the lessors of the plaintiff, and also those of the defendant, were in attendance at the last *Lent* Assizes for the county of *Somerset*, but the trial was postponed, in consequence of the illness of the learned Judge who was to have presided; and each party had to pay his own costs, which were exceedingly heavy. The lessors of the plaintiff then commenced another action of ejectment in this Court, and laid the demise in the declaration on a later day than in either of the former suits.

Mr. Serjeant *Wilde*, upon an affidavit of the above

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facts, on a former day in this term, obtained a rule *nisi*, that all further proceedings in this cause might be stayed, and that the lessors of the plaintiff might pay all the costs occasioned thereby, as well as the costs of this application, on the ground, that the action was brought in this Court, for the purpose of evading the rule of the Court of *King's Bench*; and he submitted, that the conflicting rights of the parties could and ought to be tried in the existing suits in that Court.

Mr. Serjeant *Ludlow* and Mr. Serjeant *Mercwether* now shewed cause.—The question to be determined by these suits is, whether a party, who has a right to the surface of lands in *Cornwall*, can maintain an action of ejectment, notwithstanding the claim of the Crown to minerals raised from beneath the surface. In *Hilary* Term, 1827, the Attorney-General demanded a trial at bar, on behalf of the Crown, the present defendant being also defendant in that action (a), and which was tried in the Court of *King's Bench*, in *Michaelmas* Term, 1828. The present is a motion of the first impression; and although it has been said that the action in this Court has been brought against good faith, yet the lessors of the plaintiff claimed under a new title, and under a new demise; that in the *King's Bench* being laid on the 6th *June*, 1829, and in this Court on the 12th *January*, 1830. Although the lessors of the plaintiff were placed in a disadvantageous position by the last rule of the Court of *King's Bench*, yet they were not restrained from proceeding in this Court; and they have put the process of the law in force here, to try whether the King, as Duke of *Cornwall*, has a right to enter upon the plaintiff's lands, and work the minerals beneath the soil. The Court in such a case will not order the proceedings to be stayed; for it would be a very great

(a) *Rowe v. Brenton*, 8 Barn. & Cress. 737; S. C. 3 Man. & Ryl. 133.

hardship upon the lessors of the plaintiff, if they were not allowed an opportunity of trying their right in an action where their claim is founded on a different title; and it is expressly sworn that *Carthew* and his tenants have, subsequently to the last *Easter Term*, revoked the leave and licence to enter on the lands. As, therefore, the cause of action differs from the suits in the Court of *King's Bench*, this Court will not stay the proceedings; for, in *Cox v. Chubb* (a), the Court refused to stay proceedings till the costs of former actions were paid, as the merits had not been tried; and here, the lessors of the plaintiff have a right to make their election as to which of the actions they will proceed with; and they will undertake, if the cause goes down for trial on the record in this Court, to abandon all proceedings in the three several actions in the Court of *King's Bench*. In a note by the learned reporters to the case of *Doe d. Walker v. Stevenson* (b), it is said, "The practice of the Courts of *King's Bench* and *Common Pleas* as to staying proceedings in other actions than ejectment by the same plaintiff for the same cause, seems to differ thus far—that the Court of *King's Bench* stays proceedings till the costs of the former action are paid, wherever the plaintiff's proceedings appear to be vexatious; but the Court of *Common Pleas* never interferes, unless the merits of the case have been tried in the former action:" and a number of authorities are referred to in support of that position. In the case of *Chatfield*, demandant; *Souter*, tenant (c), this Court refused to stay the proceedings on a writ of right, until payment to the tenant of the costs of a former action of ejectment between the same parties, for the recovery of the same premises; and Mr. Justice *Gaselee* referred to the distinction taken in the note in *Doe d. Walker v. Stevenson*,

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(a) 2 Sir Wm. Blac. 810.

(b) 3 Bos. & Pul. 23.

(c) 10 B. Moore, 572; S. C.
 3 Bing. 167.

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viz. that this Court never interferes to stay proceedings in a second action by the plaintiff for the same cause, unless the merits have been tried in the former action. Although, in *Parkin v. Scott* (a), where the plaintiff discontinued an action stayed in the Court of *King's Bench* by a consolidation rule, and commenced an action against the same defendant for the same cause in this Court, the latter Court ordered the proceedings to be stayed until after the trial of the cause mentioned in the consolidation rule; yet the Court admitted, that, in general, it was competent to a plaintiff to sue in one Court, although actions were pending on the same subject in another; but that, in the case before the Court, there could be no other object in view than vexation, since the plaintiff could have had no reasonable hope to obtain an earlier trial in this Court than in the *King's Bench*. Here, however, the demise is laid on a later day in the action brought in this Court, and the suit is disincumbered of leave and licence; and therefore the plaintiffs have a right to make their election, and go down to trial on this record, although the other actions in the *King's Bench* are still pending.

Mr. Serjeant *Wilde* (and Mr. Serjeant *Spankie* was with him) in support of the rule, were stopped by the Court.

Lord Chief Justice TINDAL.—This is an action of ejectment brought in this Court, by which the lessors of the plaintiff seek to recover property from an individual (the Crown having abandoned its claim), whilst three other actions of ejectment for the recovery of the same lands have been commenced by them, and which actions are still pending in the Court of *King's Bench*. If the proposition went no further, there would be sufficient ground for not

(a) 1 Taunt. 565.

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allowing the plaintiffs to proceed in the action in this Court, whilst other actions of a similar nature, and for the same cause, are pending in another. Besides, one of the causes in the Court of *King's Bench* was specially appointed to be tried in the county of *Somerset*, on the ground that an impartial trial could not be had in *Cornwall*, where the lands are situate. But this case does not rest on that dry abstract point, for the last rule in the Court of *King's Bench*, which was made on the 8th of *July* last, not only related to the three several actions then pending, but the terms of the rule were assented to by the respective counsel for the lessors of the plaintiff and the defendant, and their briefs were indorsed accordingly. The rule gave distinct and separate rights to each of the parties, and we are now called upon to deprive the defendant of the benefit he acquired under that rule, by permitting the lessors of the plaintiffs to evade it by the mere formality of commencing a fresh action of ejectment in this Court. In answer to the observation made by the counsel for the lessors of the plaintiff, that they have a right to elect in which action they will proceed;—it appears to me to be quite clear that they have already made their election, by assenting to the terms of the last rule, which was ordered to be drawn up by the Court of *King's Bench*, and assented to by all parties. Although it has been said, that this action is not brought for the same cause as the three previous actions, as the demise in the former is laid earlier than in the latter; yet it is not pretended that this action is not brought for the same cause, or that the same question will not be put in issue as in the action in which the Court of *King's Bench* has ordered the proceedings to be stayed. It therefore seems to me, that the parties, by consenting through their counsel to the terms of the last rule in the Court of *King's Bench*, have decided for themselves; and we should not do justice to both parties if we did not make the rule absolute to stay proceedings in the

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viz. that this Court never interferes to stay proceedings in a second action by the plaintiff for the same cause, unless the merits have been tried in the former action. Although, in *Parkin v. Scott* (a), where the plaintiff discontinued an action stayed in the Court of *King's Bench* by a consolidation rule, and commenced an action against the same defendant for the same cause in this Court, the latter Court ordered the proceedings to be stayed until after the trial of the cause mentioned in the consolidation rule; yet the Court admitted, that, in general, it was competent to a plaintiff to sue in one Court, although actions were pending on the same subject in another; but that, in the case before the Court, there could be no other object in view than vexation, since the plaintiff could have had no reasonable hope to obtain an earlier trial in this Court than in the *King's Bench*. Here, however, the demise is laid on a later day in the action brought in this Court, and the suit is disincumbered of leave and licence; and therefore the plaintiffs have a right to make their election, and go down to trial on this record, although the other actions in the *King's Bench* are still pending.

Mr. Serjeant *Wilde* (and Mr. Serjeant *Spankie* was with him) in support of the rule, were stopped by the Court.

LORD CHIEF JUSTICE TINDAL.—This is an action of ejectment brought in this Court, by which the lessors of the plaintiff seek to recover property from an individual (the Crown having abandoned its claim), whilst three other actions of ejectment for the recovery of the same lands have been commenced by them, and which actions are still pending in the Court of *King's Bench*. If the proposition went no further, there would be sufficient ground for not

(a) 1 Taunt. 565.

allowing the plaintiffs to proceed in the action in this Court, whilst other actions of a similar nature, and for the same cause, are pending in another. Besides, one of the causes in the Court of *King's Bench* was specially appointed to be tried in the county of *Somerset*, on the ground that an impartial trial could not be had in *Cornwall*, where the lands are situate. But this case does not rest on that dry abstract point, for the last rule in the Court of *King's Bench*, which was made on the 8th of *July* last, not only related to the three several actions then pending, but the terms of the rule were assented to by the respective counsel for the lessors of the plaintiff and the defendant, and their briefs were indorsed accordingly. The rule gave distinct and separate rights to each of the parties, and we are now called upon to deprive the defendant of the benefit he acquired under that rule, by permitting the lessors of the plaintiffs to evade it by the mere formality of commencing a fresh action of ejectment in this Court. In answer to the observation made by the counsel for the lessors of the plaintiff, that they have a right to elect in which action they will proceed;—it appears to me to be quite clear that they have already made their election, by assenting to the terms of the last rule, which was ordered to be drawn up by the Court of *King's Bench*, and assented to by all parties. Although it has been said, that this action is not brought for the same cause as the three previous actions, as the demise in the former is laid earlier than in the latter; yet it is not pretended that this action is not brought for the same cause, or that the same question will not be put in issue as in the action in which the Court of *King's Bench* has ordered the proceedings to be stayed. It therefore seems to me, that the parties, by consenting through their counsel to the terms of the last rule in the Court of *King's Bench*, have decided for themselves; and we should not do justice to both parties if we did not make the rule absolute to stay proceedings in the

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action brought in this Court, till the former action in the Court of *King's Bench* has been tried.

Mr. Justice PARK.—I most heartily concur with my Lord Chief Justice. I never saw so clear a case for the interposition of the Court; for, after the counsel for the lessors of the plaintiff and the defendant consented to the terms of a rule drawn up and sanctioned by the Court of *King's Bench*, an attempt is made to evade it by bringing a fresh action in this Court.

Mr. Justice GASELEE.—As I was engaged in the cause whilst at the bar, I decline giving any opinion on the subject.

Mr. Justice BOSANQUET.—I am also of opinion that this rule ought to be made absolute. The palpable object of bringing the action of ejectment in this Court is to avoid or defeat the rule which has been consented to in the Court of *King's Bench*. The proceedings in ejectment, being fictitious, are peculiarly under the control of the Court, and they may model them accordingly; and, by making this rule absolute to stay the proceedings, we shall not only advance the justice of the case, but confine the parties to the terms of the rule to which they have expressly consented in another Court.

Per Curiam.

Rule absolute, without costs.

1830.

ADCOCK v. FELTON.

Friday,
Feb. 12th.

A RULE was obtained by Mr. Serjeant *Storks*, on a former day in this Term, calling upon the plaintiff to shew cause, why the writ of attachment of privilege, which had been issued against the defendant in this cause, on *Friday* the 29th *January*, should not be set aside for irregularity, the writ having been made returnable on *Wednesday* next after fifteen days of *St. Hilary*. The learned Serjeant submitted, that there was no such return day. "In fifteen days of *St. Hilary*" would have been on *Wednesday* the 27th of *January*, and the *Wednesday* next after was the 3rd of *February*, which was in law styled "on the morrow of the *Purification*," and was a *dies non*.

A writ of attachment of privilege having been made returnable on *Wednesday* next after fifteen days of *St. Hilary*, which happened to be the morrow of the *Purification*:—Held to be irregular; and the Court set aside the writ on motion.

Mr. Serjeant *Jones* now shewed cause.—A writ of attachment of privilege must be made returnable on a day certain, in full term, and not on a general return day by name. If the plaintiff had made the writ returnable on the morrow of the *Purification*, it would have been irregular, because it was the style of the day as a general return day; but by making the writ returnable on *Wednesday* next after fifteen days of *St. Hilary*, he shewed that he meant to use it as a day certain; and a general return day may be taken for a day certain, as well as any other day, provided its style as a general return day be not adopted in the writ.

Lord Chief Justice TINDAL.—I am of opinion that the return of this writ is irregular. Certain general return days have been appointed by statute, and it has invariably been the practice to reckon from one return day to the next following, and then to commence a fresh computation. It is highly important that the settled and uniform

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course should be observed, as the introduction of new return days tends to confuse and perplex; besides which, it is clearly an irregularity, which the Court ought not to countenance.

The rest of the Court concurring—

Rule absolute.

Friday,
Feb. 12th.

The Court will not take judicial notice of an entry of a writ of *capias ad satisfaciendum* in the Sheriff's book.

RUSSELL v. DICKSON.

A RULE was obtained by Mr. Serjeant *Jones*, on a former day in this term, calling upon the plaintiff to shew cause why the *cognovit* which had been given by the defendant in this cause, and a judgment which had been entered up, and writ of *capias ad satisfaciendum* sued out thereon, should not be set aside for irregularity, with costs, and why the time for the defendant's bail to surrender him in their discharge should not be enlarged. The application was made on behalf of one of the bail, and an affidavit was produced, which stated that the plaintiff laid his damages in the declaration at 300*l.*; that, on the 30th *May*, the *cognovit* was given for 500*l.*, besides costs, subject to a defeazance, that no judgment should be entered up thereon, unless the defendant made default in payment of the sum of 250*l.* 17*s.*, the amount of the debt, and 28*l.* 18*s.* for costs, on the 1st day of *November* then next. That judgment was entered up on the first day of the last *Michaelmas* Term, for 500*l.*, the amount of the sum secured by the *cognovit*; and that, by the writ of *capias ad satisfaciendum*, which was sued out on the 18th *November* (as appeared by an entry in the book kept at the office of the Sheriff of *Middlesex*), the

Sheriff was commanded to take the defendant, to satisfy the sum of 404*l.* 11*s.* for damages recovered by the plaintiff. The learned Serjeant submitted, that, as the *cognovit* was given for 500*l.*, it was clearly irregular, as it exceeded the damages laid in the declaration; and that as the writ of *ca. sa.* was sued out with a view to fix the bail, the sum to be levied as against the defendant should correspond with that in the body of the *cognovit*; whereas, the Sheriff was commanded to take the defendant to satisfy the plaintiff 404*l.* 11*s.*, and the sums secured by the *cognovit* were 250*l.* 17*s.* the debt, and 28*l.* 18*s.* for costs, amounting together to 279*l.* 15*s.*

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v.
DICKSON.

Mr. Serjeant *Wilde* now shewed cause, on affidavits which stated, that the *cognovit* was given and executed by the defendant, with the consent of the bail; that they had also expressly assented to its terms, and agreed that it should not discharge them from their liability; and they also undertook not to impeach the judgment which might be entered up in conformity thereto. Besides, the bail merely deposed that the Sheriff was commanded by the *ca. sa.* to take the defendant for 404*l.* 11*s.*, as appeared by an entry in the book kept at the Sheriff's office; but that entry is not evidence, as it was a mere memorandum in a private book, and the writ itself might and ought to have been inspected. The affidavit, therefore, in support of the application is defective; and it is quite clear that the justice of the case is with the plaintiff.

Mr. Serjeant *Jones*, in support of his rule.—The proper place for the bail to apply, for the purpose of ascertaining the amount of the sum for which the *ca. sa.* was sued out, was at the Sheriff's office; and although the bail might have inspected the writ itself, yet the entry in the Sheriff's book was sufficient to satisfy him: and the Court always favours applications on behalf of bail.

1830.
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 RUSSELL
 v.
 DICKSON.

Lord Chief Justice TINDAL.—The only question is, whether we are to take judicial notice of the entry in the Sheriff's book. If the bail could have derived better and more direct information from another source—and which he clearly might have done, we ought not to be bound by such entry. The Sheriff might enter the sum named in the writ, or not. The proper application would have been to the office of the *custos breviarum* of this Court, when the bail or his attorney would have ascertained whether the writ had been duly returned or not, as well as the sum the Sheriff was directed to levy.

The rest of the Court concurring—

Rule discharged.

Friday,
 Feb. 12th.

GREEN v. POLE.

Where a verdict was taken for the plaintiff at *Nisi Prius*, subject to an award; and after the arbitrator had heard the evidence for both parties, but before the order of reference was made a rule of Court, the plaintiff revoked the authority of the arbitrator, by deed, and proceeded in the action; the Court refused to stay the proceedings.

THIS was an action of *assumpsit* on a policy of insurance, and in which the plaintiff sought to recover for a loss which he had sustained by fire. At the trial, before Lord Chief Justice Tindal, at the Sittings at *Guildhall* after the last *Trinity* Term, by an order of *Nisi Prius*, and with the consent of all parties, a verdict was taken for the plaintiff, damages 1000*l.*, subject to the award of an arbitrator (a barrister). The reference was proceeded with, but, before the arbitrator made his award, the plaintiff revoked his authority by deed, and gave the defendant notice of trial at the first Sittings in this Term.

Mr. Serjeant Taddy, on a former day in this Term, on the part of the defendant, obtained a rule calling on the plaintiff to shew cause why all further proceedings in this action should not be stayed till the further order of the Court; and he produced an affidavit, which stated, that,

after all the evidence for both the plaintiff and defendant had been produced and heard by the arbitrator, who fixed the 8th day of *December* last for the final attendance of the parties, the plaintiff, by deed, revoked the arbitrator's authority, without assigning any reason for so doing, or applying to postpone the last meeting, for the purpose of procuring further evidence in reply to that produced on behalf of the defendant.

1830.

GREEN
v.
POLE.

Mr. Serjeant *Wilde* and Mr. Serjeant *Andrews* now shewed cause, on an affidavit of the plaintiff's attorney, which stated, that, at the last meeting previous to the 8th of *December*, the plaintiff's counsel said, that he should call witnesses to contradict several of those who had been called for the defendant; that the plaintiff afterwards applied to six different persons, who were able to give material evidence for him; but that, in consequence of their refusal to attend before the arbitrator, the plaintiff, by the advice of his counsel, caused the deed of revocation to be served upon the arbitrator. Under these circumstances, the learned Serjeant submitted, that it was a well-known and established principle, that a party submitting to arbitration has a right to revoke the authority of the arbitrator at any time before he makes his award; and here, as the order of *Nisi Prius* by which the cause had been referred, had not been made a rule of Court at the time the deed of revocation was served on the arbitrator, the plaintiff had a right to proceed with the action; for, in *Clapham v. Higham* (a), where a cause was referred by an order of *Nisi Prius*, with the consent of the parties, and one of them revoked his submission before the award was published; notwithstanding which, the arbitrator afterwards made his award, the Court set it aside, although the order of *Nisi Prius* had been made a rule of Court before the award was executed.

(a) 7 B. Moore, 403; S. C. 1 Bing. 87.

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GREEN
v.
POLE.

Mr. Serjeant *Taddy*, in support of his rule.—The plaintiff has certainly acted contrary to good faith; and the Court will direct him to go again before the arbitrator, which may be accomplished by staying all further proceedings in the cause. The plaintiff and defendant had not only attended several meetings before the arbitrator, but he had heard the whole of the evidence; and the only excuse the plaintiff made for not attending the last meeting was, that certain of his witnesses had refused to attend. He may now have further time to endeavour to procure their attendance; and the probability is, that those persons were aware that their testimony would not avail the plaintiff, or establish the point he called upon them to prove.

Lord Chief Justice TINDAL.—I have every inclination to make this rule absolute, if the Court had power so to do; but, there is no legal ground to support the application. It is a well-known and established principle, that the authority of an arbitrator may be revoked or countermanded by any of the submitting parties, at any time before the award is made, or the authority of the arbitrator is executed. The only mode of deterring a party from revoking his submission, when a cause is referred by an order of *Nisi Prius*, is to make the order a rule of Court; and, if he afterwards revokes the authority of the arbitrator, he is liable to an attachment for contempt. Here, however, the plaintiff revoked his submission before the order of *Nisi Prius* was made a rule of Court; and the defendant had an opportunity of doing so during the whole of the last *Michaelmas* Term.

The rest of the Court concurring—

Rule discharged.

END OF HILARY TERM.

CASES
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,
IN EASTER TERM,

IN THE ELEVENTH YEAR OF THE REIGN OF GEO. IV.

DANCE, Provisional Assignee of SHEPHARD, an Insolvent
Debtor *v.* WYATT and NASH.

1830.

Thursday,
April 29th.

THIS was an action of trover for a writing-desk, and brought by the plaintiff, as provisional assignee of the Insolvent Debtors' Court, for the purpose of trying the validity of a commission of bankrupt which had been issued against *Shephard* previously to his petitioning the Insolvent Debtors' Court for his discharge under the statute 7 *Geo. 4*, c. 57. The action was commenced in the name of the plaintiff, under the following order of the Insolvent Debtors' Court:—

The assignment of an insolvent's estate and effects to the provisional assignee gives him a right to sue, and the 16th section of the statute 7 *Geo. 4*, c. 57, which enacts, that it shall be lawful for such assignee to sue in his own name, *if the Court shall so order,*

is only affirmative of his right, and it is not necessary that he should previously obtain the order of the Court for that purpose.

An insolvent debtor, in his petition to the Insolvent Court, having stated that he had been declared a bankrupt:—*Held*, that the provisional assignee might institute proceedings to try the validity of the commission. The question, when a trader ceases to trade, is purely for the consideration of the Jury.

1830.

DANCE
v.
WYATT.

“ Pursuant to the act for the relief of insolvent debtors in *England*:

“ The Court for the relief of insolvent debtors, on the 9th day of *December*, 1828:

“ In the matter of the petition of *Thomas Shephard*, an insolvent debtor, lately a prisoner in the *King's Bench* prison,

“ Upon application of the said insolvent debtor, and on reading his affidavit, and also on reading the consent of *Henry Dance*, gentleman, provisional assignee, it is ordered, that the said provisional assignee, upon receiving a satisfactory indemnity, be at liberty to permit an action to be brought in his name against *Thomas Wyatt* and *Andrew John Nash*, mentioned in the said affidavit.”

The commencement of the declaration was as follows:—

“ *Thomas Wyatt* and *Andrew John Nash* were attached to answer *Henry Dance*, the plaintiff in this suit, and provisional assignee of the Court for the relief of insolvent debtors, and of the estate and effects of *Thomas Shephard*, late of *Claremont Row, Pentonville*, in the county of *Middlesex*, heretofore an insolvent debtor, and discharged from imprisonment in pursuance of an act of Parliament made in the seventh year of the reign of his present Majesty, intituled ‘ An Act to amend and consolidate the laws for the relief of insolvent debtors in *England*,’ by order of the same Court, in that behalf duly made, of a plea of trespass on the case,” &c.

The insolvent, *Shephard*, in his petition to the Insolvent Debtors' Court, described himself as being formerly a surgeon in the *East India Company's* service, and that he was afterwards a merchant, residing at *Claremont Row, Pentonville*; and that, on the 14th *July*, 1828, he had been duly declared a bankrupt. His petition to the Insolvent Court was presented to that Court in the beginning of *December* following.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, it ap-

peared that the insolvent went to *India* in *January*, 1817, and carried on trade there as a general merchant; that he returned to this country in 1818, and went back to *India* in *July* in that year; that he again returned to this country in 1825, to settle with several of his creditors who had sent goods to him in *India*; and that he said, that when he had arranged with them he should return to *India*. Under these circumstances, the Lord Chief Justice left it to the Jury to say, whether the insolvent was a trader in 1825. They found that he was not; and a verdict was accordingly entered for the plaintiff, damages one shilling, leave being reserved to the defendants to move to set aside the verdict, and enter a nonsuit, or that a new trial might be had, in case the Court should be of opinion that the action had been improperly brought by the plaintiff in his character of provisional assignee; or that the Insolvent Debtors' Court had not jurisdiction to cause proceedings to be instituted to impeach the validity of a commission of bankrupt, which had been previously sued out against the insolvent, and which was in force at the time of his presenting his petition to the Insolvent Debtors' Court.

Mr. Serjeant *Taddy* yesterday moved accordingly.—*First*, The 16th section of the insolvent debtors' act, 7 Geo. 4, c. 57, enacts, "That it shall be lawful for the provisional assignee of the Insolvent Debtors' Court, to take possession of all the real and personal estate and effects of every such prisoner as shall subscribe his petition and execute a conveyance and assignment as therein before directed; and that it shall be lawful for the said provisional assignee to sue in his own name, if the said Court shall so order, for the recovering, obtaining, and enforcing of any estate, debts, effects, or rights of any such prisoner." Now, the plaintiff, as provisional assignee, is not within the authority given by that clause; and he was not entitled to bring this action, unless it appeared, *by the order*

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of the Insolvent Debtors' Court, that he was empowered by them so to do. The Court merely ordered that the provisional assignee should be at liberty to permit an action to be brought in his name; whereas, the terms of the statute are, that it shall be lawful for the provisional assignee to sue in his own name, if the Court shall so order. The Court, therefore, ought to have exercised their discretion upon the subject, upon investigating the circumstances of the case before them, and not have left it to the option of the provisional assignee, whether he would permit an action to be brought in his name or not.—*Secondly*, This action is not maintainable, as it was brought for the purpose of questioning the validity of a commission of bankrupt, which had been sued out against the insolvent *Shephard*, before he presented his petition to the Insolvent Debtors' Court. It is highly indecorous for one Court to institute proceedings to inquire into the propriety of a decision pronounced by another Court, or to impeach its jurisdiction. Besides, the insolvent in his petition stated that he had been duly declared bankrupt; and therefore, those creditors who had proved under his commission could not oppose his discharge; and he sought to be relieved under the 7 Geo. 4, on the ground that he had been previously declared a bankrupt. The 13th section enacts, "That the filing of the petition of every person in actual custody, who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the Insolvent Court for his discharge from custody according to that act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition; and the 64th section enacts, that no person petitioning the Insolvent Court for relief under that act, who shall have been at any time discharged by virtue of the same, or of any other act for the relief of insolvent debtors, or who shall have been duly declared bankrupt before the commencement of his imprisonment, under any commission

still remaining in force, and shall not have obtained his certificate under such commission, shall be entitled to the benefit of that act within the space of five years after such discharge or declaration of bankruptcy, except in certain cases in that clause enumerated." So, by the late bankrupt act, 6 Geo. 4, c. 16, s. 6, it is enacted, that if any trader shall file a declaration in writing, signed by him, that he is insolvent, or unable to meet his engagements, it is an act of bankruptcy committed by such trader at the time when such declaration was filed. Whenever, therefore, the jurisdiction of the commissioners of bankrupt clashes with that of the commissioners appointed for the relief of insolvent debtors, the Legislature gives the preference to the former; and here, the insolvent expressly stated in his petition that he had been a merchant, and duly declared a bankrupt. *Lastly*, as to the trading. It ought not to have been left to the Jury to say whether *Shephard* carried on trade in the year 1825, but whether he had then ceased to be a trader; for, in *Ex parte Paterson*, Lord *Eldon* said (a): "That a bankrupt has ceased to be a trader, does not depend upon the fact, whether or not you can find any specific acts of trading; but whether or not, in point of intention, he had ceased to be a trader. It is a question for a Jury, whether there was an entire cessation of trading, or merely an interruption, with an intention of resuming it when an opportunity should offer;" and here, as the only question left to the Jury was, whether *Shephard* was a trader in 1825, they could only find that dry fact, although they might have thought differently, if it had been left to them to say whether he had then ceased to be a trader, or whether he had not an intention to resume it, and there was evidence to shew that he did not consider that his trading was altogether at an end in 1825: therefore, at all events, there ought to be a new trial.

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(a) 1 Rose's Bkptcy. Cases, 405.

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The Court said, that they would look into the authorities, for the purpose of ascertaining whether this Court could interfere, after an order made by the Insolvent Debtors' Court.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

We have looked into the cases applicable to this case, and are of opinion that the rule ought not to be granted. Three objections have been raised to the verdict—*First*, that the plaintiff had no authority to sue, because he had not brought himself within the language of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, as he had no direct order from the Insolvent Debtors' Court to institute proceedings against the defendant. But, inasmuch as the right to the property, estate, and effects of the insolvent vests in the provisional assignee by the assignment to him, that alone gives him a *prima facie* right to sue, independently of the statute. The 16th section enacts, that it shall be lawful for the provisional assignee to sue in his own name, if the Court shall so order. Those words appear to us to be only affirmative, and not to interfere with or take away the *prima facie* right of the provisional assignee to sue. The Insolvent Debtors' Court might prevent him from proceeding in case he did not institute a suit properly, or without the sanction of that Court. But this point has been in effect decided in the case of *Doe d. Clark v. Spencer* (a). There, on an application to enter a nonsuit, on the ground, that the provisional assignee did not shew at the trial that he had obtained the order of the Insolvent Debtors' Court to sue, Lord Chief Justice Best said: "Another objection has now been raised, which was not suggested at *Nisi Prius*, but to which we are bound to yield, if the defendant be in

(a) 11 B. Moore, 7; S. C. 3 Bing. 203.

justice entitled to it, *viz.* that the provisional assignee could not maintain this action without shewing that it was brought with the approbation of one of the commissioners, and the consent of the major part in value of the creditors, or the *order of the Insolvent Debtors' Court*. But I am of opinion, that, under both the statutes to which we have been referred (*a*), there is no foundation for this objection, and that such proof could not have been required at the trial." We see no reason to vary from that decision; and, although the question arose on a former statute, yet the words of the second section of the 3 Geo. 4, c. 123, and of the 16th clause of the statute 7 Geo. 4, c. 57, are precisely the same as far as regards the question now before us.

The *second* objection was, that it is not competent to the Insolvent Debtors' Court to institute proceedings for the purpose of impeaching the jurisdiction of commissioners of bankrupt, as the Legislature gives a preference to the jurisdiction exercised by such commissioners. But it is enough for us to say, in answer to that argument, that it assumes that the insolvent has been a bankrupt, which is the very point in dispute. That, therefore, can be no ground to prevent the provisional assignee from instituting proceedings against the present defendants.

The *third* objection is, that there was not sufficient evidence adduced at the trial to shew that *Shephard* had ceased to be a trader. All the former statutes relating to bankrupts were repealed by the 6 Geo. 4, c. 16; and, in *Maggs v. Hunt* (*b*), where a commission of bankrupt was sued out against a trader in *September*, 1825, upon an act of bankruptcy committed by him in *July* preceding, it was held, that the commission could not be supported, as no act of bankruptcy had been committed since that statute

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(*a*) 1 Geo. 4, c. 119; 3 Geo. 4, c. 123.

(*b*) 12 B. Moore, 357; S. C. 4 Bing. 212.

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came into operation. That applies equally to a trading by the bankrupt; and here, it was not shewn that *Shepherd* had carried on any trade subsequently to the beginning of *July*, 1825. Besides, the evidence as to the trading was fully left to the Jury; and we have no ground for saying that they have not come to a right conclusion. We are, therefore, of opinion that there is no ground for a nonsuit, or for a new trial, for, if the cause were to go down again, the question as to the trading must be left to the Jury as it was done at the former trial.

Rule refused.

Thursday,
April 29th.

The plaintiff declared, that the defendant, intending to prejudice him in the way of his business as a fruit-broker, falsely represented to *J. P.*, that the plaintiff had circulated a report in a sale-room where oranges of *J. P.* were selling, that *he the plaintiff* then had three or four vessels laden with oranges, between *Gravesend* and *London*; by reason of which, *J. P.* discontinued to deal with the plaintiff.—Proof, that the defendant represented the

plaintiff to have said, that *there were* three or four vessels laden with oranges between *Gravesend* and *London*:—*Held*, a fatal variance.

WOOD v. ADAM.

THIS was an action on the case, by which the plaintiff sought to recover damages from the defendant, for his having said to a third person, that the plaintiff had reported in a sale-room that he had several vessels laden with the article offered for sale, on their way to market, by which the sale was prejudiced, and the sellers, who had previously dealt with the plaintiff as their broker, discontinued so to do.

The first count of the declaration stated, that the plaintiff, before and at the time of the committing the grievances by the defendant, as thereafter mentioned, had been and was a fruit-broker, and the business of a fruit-broker exercised and carried on with great credit and integrity, to wit, at *London*; that certain oranges, of and belonging to certain persons trading under the style or firm of Messrs. *John Pirie and Company*, had recently, before the committing of the said grievances by the defendant, as next mentioned, been sold and disposed

of for the account of the said Messrs. *John Pirie & Co.*, at and for certain prices, unsatisfactory to the said Messrs. *John Pirie & Co.*, to wit, at *London*, to wit, in a certain sale-room or premises there; and thereupon afterwards, to wit, on &c., at *London* aforesaid, in a certain discourse which the defendant then and there held with *John Pirie*, (he then and there being one of the persons so trading under the said style or firm), of and concerning the said sale of the said oranges, and of and concerning the cause of the same not having fetched better prices, the defendant then and there maliciously contriving and intending to prejudice and injure the plaintiff in the way of his said business as a fruit-broker, and to deprive him of the confidence and good opinion of the said Messrs. *John Pirie & Co.*, and to cause the said last-mentioned persons to believe that the plaintiff had been the cause of the said oranges not having fetched better prices, on the occasion aforesaid, did then and there falsely, deceitfully, and maliciously pretend and represent to the said *John Pirie*, that the plaintiff had circulated a report in the sale-room, when and where the said oranges were selling, that *he the plaintiff then had* three or four vessels laden with oranges between *Gravesend* and *London*; and that the said report had injured the said sale of the said oranges of them the said Messrs. *John Pirie & Co.*; whereas, the plaintiff, in truth and in fact, did not circulate, or cause to be circulated, a report in the sale-room when and where the said oranges were selling as aforesaid, or otherwise howsoever, that *he the plaintiff then had* three or four vessels laden with oranges, or any vessel or vessels laden with oranges, between *Gravesend* and *London*; and whereas, in truth and in fact, it was not reported at or during the said sale, that the plaintiff had three or four vessels laden with oranges between *Gravesend* and *London*, or that he had any vessel or vessels so laden as aforesaid, be-

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tween *Gravesend* and *London*, as the defendant during all that time well knew. By means of which said several deceitful and malicious representations and pretences of the defendant, the said Messrs. *John Pirie & Co.* then and there believing the same to be true, were then and there induced to suspect and believe, and did in fact suspect and believe, that the plaintiff had maliciously made or authorized the said report as to his, the plaintiff's, having three or four vessels laden with oranges between *Gravesend* and *London*, and had thereby maliciously prejudiced the said sale of them the said Messrs. *John Pirie & Co.*'s said oranges, and been the cause of their not having fetched better prices on the occasion aforesaid; and thereby the said Messrs. *John Pirie & Co.* were then and there induced to discontinue, and did in fact accordingly then and there discontinue, and hitherto had discontinued, dealing with the plaintiff, as they theretofore had been used to deal, and, but for the premises in that count mentioned, still would have dealt with him in the way of his business of a fruit broker; and the plaintiff had thereby lost divers large profits and emoluments, to wit, to the amount of 100*l.*, which he otherwise would have acquired from so being dealt with as theretofore by the said Messrs. *John Pirie & Co.*; and the plaintiff had been and was, by means of the premises in that count mentioned, brought into great scandal and discredit in the way of his said business, and had been and was thereby otherwise greatly injured and damnified, to wit, at *London* aforesaid.

The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last term, the plaintiff's witnesses proved that the defendant had represented the plaintiff to have said in the sale-room, just before the sale of the oranges in question took place, that *there were three or four vessels* laden with oranges between *Gravesend* and *London*; upon which his Lordship directed a nonsuit

to be entered, on the ground, that the plaintiff had failed to establish the allegation in his declaration, that the defendant had represented that the plaintiff had circulated a report in the sale-room that *he, the plaintiff, then had* three or four vessels laden with oranges between *Gravesend* and *London*.

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Mr. Serjeant *Wilde* now applied for a rule nisi that the nonsuit might be set aside and a new trial granted, on the ground, that, as this was not an action of slander, but merely charging the defendant with the publication of certain words stated to have fallen from the plaintiff, it is not necessary that the precise words should be proved; because, a far greater latitude is allowed in this species of action than in an action for words, the publication of which causes a special damage to the plaintiff; but here, as he only sought to recover damages for the consequences of a misrepresentation by the defendant, the precise language in which it was conveyed is immaterial. In *Ditcham v. Chivis* (a), in an action on the case, against the proprietor of a stage-coach, for an injury sustained by a passenger, the declaration alleged, that the defendant was the owner of a stage-coach for the conveyance of passengers from *London* to *Blackheath*, and that he had agreed to receive the plaintiff as a passenger, to be carried from *London* to *Blackheath*; and it was proved that the words "*London to Blackheath*" were painted on the coach-door, but that the coach was licensed to run from *Charing Cross* only, and that the plaintiff was taken up at the *Elephant and Castle*, in *St. George's Fields*; it was held, that the variance was immaterial, and that the allegation in the declaration was sufficiently proved, as it was not a substantial or material allegation. So, in *Frith v. Gray* (b), in an action

(a) 1 Moore & Payne, 735; S. C. 4 Bing. 706.

(b) 4 Term Rep. 561, n.

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upon an agreement to procure a booth at a horse-race on *Barnet Common*, in the county of *Middlesex*, and it was proved that the whole of *Barnet Common* was in the county of *Hertford*; it was held, that the allegation respecting the county being immaterial, it might be rejected. So, in *Drewry v. Twiss* (a), in an action on the case, for running down the plaintiff's boat in the river *Thames*, at a certain place *near the Half-way Reach*, and it was proved that the accident happened *in the Half-way Reach*; it was held, that the variance was immaterial. If, therefore, a contract be stated or set out in the declaration, which does not go to the gist of the action, the same precision and accuracy are not necessary as in a case where the breach of contract formed the foundation of the action. Now, here the plaintiff's ground of action was the alleged injury he had sustained by Messrs. *Pirie & Co.* having discontinued to deal with him, as they had before been accustomed to do, in consequence of what the defendant had misrepresented, *viz.* that the plaintiff had said in the sale-room, with a view to injure the sale of Messrs. *Pirie & Co.*'s fruit, that he had then three or four vessels laden with oranges between *Gravesend* and *London*. The statement by the defendant, that the plaintiff had propagated a report that there were three or four cargoes of oranges between *Gravesend* and *London*, and which was proved at the trial, would be equally detrimental to the sale of the oranges. The naming the owner of the ships was therefore immaterial: and the allegation that the defendant had represented the plaintiff to have circulated a report that there were three or four vessels laden with oranges between *Gravesend* and *London*, was proved in substance; and whether the vessels belonged to the plaintiff or not, he has sustained an injury by the defendant's having imputed to him that he had propagated a report which was false in fact. The plaintiff is therefore entitled to a new trial.

(a) 4 Term Rep. 558.

Lord Chief Justice TINDAL.—It appeared to me, at the trial, that this action was, in substance and effect, an action for words spoken of the plaintiff in the way of his trade, by which he had sustained a special damage; *viz.* that, by means of the deceitful and malicious representations and pretences of the defendant, Messrs. *Pirie & Co.* discontinued dealing with the plaintiff, as they had been theretofore used to deal, in his business of a fruit-broker. It therefore seemed to me, that this action ought to be governed by the ordinary rules which apply to cases of defamation or oral slander. One of those rules is, that a plaintiff in his declaration is not to charge a defendant with having used more malignant words than he actually employed, because, the damages must, in a great measure, depend on the nature of the language or expressions adopted by the defendant. Now, here the plaintiff has alleged in his declaration, that the defendant, maliciously intending to prejudice and injure the plaintiff in the way of his business, pretended and represented to *Pirie*, that the plaintiff had circulated a report, in a sale-room where *Pirie's* oranges were selling, that *he the plaintiff then had* three or four vessels laden with oranges between *Gravesend* and *London*. Now, if the plaintiff had made such a statement or report, it must have been false within his own knowledge; for he must have known whether he had ships laden with oranges coming to *London* or not. But the witnesses called in support of that charge, only proved that the defendant had represented the plaintiff to have reported in the sale-room, that there were three or four cargoes of oranges between *Gravesend* and *London*, and not that the *plaintiff himself* had such vessels, or that they belonged to him. I therefore thought that the allegation in the declaration was not sustained by the evidence; and I still entertain the same opinion.

Mr. Justice PARK.—I think the nonsuit was proper. I admit the distinction between a material allegation and an

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avermment by way of inducement, which does not require the same degree of accuracy or precision, or strict mode of proof; and that was the principle on which we decided the case of *Ditcham v. Chivis*, which I think was rightly decided. Here, the gist of the action is a misrepresentation by the defendant, of words reported to have been used by the plaintiff in a public sale-room; and although this is not strictly an action of slander, it is so in effect. The plaintiff would, perhaps, have had no reason to complain of the statement as proved to have been made by the defendant, *viz.* that there were three or four vessels laden with oranges between *Gravesend* and *London*; but the plaintiff alleged that the defendant had represented to *Pirie*, that the plaintiff had reported in the sale-room, that *he, the plaintiff*, then had three or four vessels laden with oranges. That, therefore, is far stronger than merely representing that the plaintiff had said that there were three or four cargoes of oranges between *Gravesend* and *London*; for, whether the vessels or cargoes were his own, was a fact within his own knowledge. I am therefore of opinion, that the variance between the allegation in the declaration, and the words as proved, was a fatal variance; and, consequently, that the plaintiff is not entitled to a new trial.

Mr. Justice GASELEE.—I also think that the nonsuit is right; for it makes a very material difference if a party assert a fact, as being within his own knowledge, or merely on general report. If the variance had been as to the number of vessels alleged to have been between *Gravesend* and *London*, the question would have been different; but the allegation, that the defendant had represented the plaintiff to have reported that *he* had three or four vessels laden with oranges, is widely different from a report that there were three or four vessels laden with oranges between *Gravesend* and *London*.

Mr. Justice BOSANQUET.—I am also of opinion, that the

plaintiff was rightly nonsuited. The allegation in the declaration, in substance, is, that the defendant represented the plaintiff to have circulated a false report, or made a false statement, in a public sale-room, by representing that *he* had three or four vessels laden with oranges between *Gravesend* and *London*; by reason of which, Messrs. *Pirie & Co.* had discontinued to deal with the plaintiff in the way of his business as a fruit-broker. Whether the plaintiff had three or four ships of his own, was a fact peculiarly within his own knowledge; but he only proved that the defendant had represented the plaintiff to have asserted that there were three or four vessels laden with oranges between *Gravesend* and *London*. The proof, therefore, appears to me to vary in a most material point from the allegation in the declaration. There is, consequently, no ground for setting aside the nonsuit, or granting a new trial.

Rule refused.

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MANN v. BERTHEN.

Thursday,
April 29th.

A RULE was obtained by Mr. Serjeant *Wilde*, in the last term, calling upon the plaintiff, an infant, who sued by his guardian, to shew cause why all further proceedings in the action should not be stayed, until the guardian gave security for costs, or that the appointment of the guardian might be revoked. The learned Serjeant founded his motion on an affidavit, which stated that the guardian was in insolvent circumstances, being a journeyman chair-maker, and that he had no visible property or effects.

Where an infant sues by guardian, who is sworn to be in insolvent circumstances, the Court will require him to give security for costs.

Mr. Serjeant *Andrews* now shewed cause, and relied on the case of *Morgan v. Evans* (a), where the Court refused to require the plaintiff to give security for costs, although

(a) 7 B. Moore, 344.

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it was sworn that he was insolvent, and that the action was brought in his name for the benefit of a third person, who was alone beneficially interested in the result of the suit; and in an *Anonymous* case (a), this Court refused to compel an infant plaintiff to give security for costs.

Mr. Serjeant *Wilde*, in support of his rule.—The guardian was appointed by the Court; and as he is not in a condition to pay costs, in case the plaintiff should be nonsuited, or the defendant obtain a verdict, either his appointment ought to be revoked, or he should give the security required; for in *Doe d. Selby v. Alston*, Mr. Justice *Buller* said (b), “ There are only three instances in which the Court will interfere on behalf of a defendant, to oblige the plaintiff to give security for costs; the *first* is, when an infant sues, the Court will oblige the *prochein amy*, or guardian, or attorney, to give security for the costs; *secondly*, when the plaintiff resides abroad; and, *thirdly*, where there has been a former ejectment.” Although, in *Yarwouth v. Mitchel* (c), the Court of *King's Bench* held, that an infant who sues by his *prochein amy* need not give security for costs, though the *prochein amy* is sworn to be insolvent; yet there he was the father of the infant, whilst this is the case of a guardian appointed by the Court, who is distinguishable from a *prochein amy*, or nearest friend of the infant.

Per Curiam.—We think, that, under the circumstances, the defendant is entitled to the security he requires.

Rule absolute.

(a) 1 Marsh. 4.

(b) 1 Term Rep. 491.

(c) 2 Dow. & Ryl. 423.

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Monday,
May 3rd.

WESTALL v. STURGES.

THE plaintiff *Westall*, as assignee of one *Henry Bates*, a bankrupt, having died since his appointment, and another assignee having been chosen in his stead—

The plaintiff, assignee of a bankrupt, having died, and another assignee having been appointed in his stead, the rule to enter a suggestion of such death on the record, in pursuance of the statute 6 Geo. 4, c. 16, s. 67, is absolute in the first instance.

Mr. Serjeant *Wilde* applied for a rule *nisi*, to enter a suggestion of that fact on the roll, and to substitute the name of the new assignee, in pursuance of the 67th section of the statute 6 Geo. 4, c. 16, by which it is enacted (a), "That whenever an assignee shall die, or a new assignee or assignees shall be chosen as aforesaid, [see sect. 66], no action at law, or suit in equity, shall be thereby abated; but the Court in which any action or suit is depending, may, upon the suggestion of such death, or removal and new choice, allow the name of the surviving or new assignee or assignees to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same."

Lord Chief Justice TINDAL.—I think that the rule in this case may be made absolute in the first instance; and let the suggestion be entered accordingly.

Rule absolute.

(a) This is a new clause.

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Monday,
May 3rd.

CHAMBERS v. BERNASCONI and two Others.

The plaintiff, an uncertificated bankrupt, in order to try the validity of the commission issued against him, arrested his assignees, upon an affidavit that they were indebted to him for money had and received to his use. The assignees having given bail to the Sheriff, the Court ordered the bail-bonds to be delivered up to be cancelled, on their entering a common appearance.

THE plaintiff, an uncertificated bankrupt, sued out bailable process against the three defendants, his assignees, under a commission which had been issued against him. The plaintiff made an affidavit, that the defendants were indebted to him in the sum of 40,000*l.* and upwards, for money had and received by them to his use; by virtue of which, two of the defendants were arrested, and gave bail to the Sheriff. The object of the plaintiff being to try the validity of the commission, Lord Chief Justice *Tindal*, on the 27th *March* last, made an order for delivering up the bail-bonds to be cancelled as to the two defendants who had been arrested, on their entering a common appearance, and also to restrain the plaintiff from arresting the defendant *Bernasconi*, or taking any further proceedings against him in the meantime.

Mr. Serjeant *Russell*, on a former day in this term, on the part of the plaintiff, applied for a rule to shew cause why the above order of the Lord Chief Justice should not be rescinded or set aside, or why the defendants should not pay the above sum of 40,000*l.* into Court. The learned Serjeant submitted, that there could be no doubt but that a bankrupt might hold his assignees to bail for money had and received by them to his use; and he may also contest the validity of the commission sued out against him in such an action; and, although trover is the usual form of action, yet, in *Donovan v. Duff* (a), the assignee of an insolvent debtor brought an action for money had and received against the assignee under a commission of bankrupt sued out against the insolvent, and by which the plaintiff sought to recover the proceeds of property be-

(a) 9 East, 21.

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longing to the bankrupt, and which had been disposed of by the defendant, as his assignee under the commission. There, the action was brought for the express purpose of trying the validity of the commission, and no objection was raised as to the form of action. It is, therefore, quite clear that the plaintiff, in this case, had a right to hold the defendants to bail for money had and received by them to his use; for, in *Tidd's Practice*, it is said (a), special or common bail is no longer discretionary in the Court, but is governed by the arrest, it being a general rule, that, whenever the defendant may be arrested, he may be holden to special bail. Although, in *Ex parte Catten* (b), a bankrupt, who had abandoned a petition presented for a *supersedeas*, and joined in a conveyance of part of his property, and solicited and procured the requisite signatures to his certificate, was restrained from proceeding in an action against the messenger, to try the validity of the commission; yet here, the plaintiff not only asserted his right to dispute the commission, but never abandoned it, nor had he obtained his certificate; he therefore had a right to arrest his assignees for money received by them after the suing out of the commission; and the Court will not try the merits of the action on affidavit.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

This was an application to the Court for a rule to shew cause, why an order made by the Chief Justice, in vacation, in this cause, should not be set aside; or why the sum of 40,000*l.*, for which the defendants had been arrested, should not be paid into Court. It appeared, upon the making of the original order, that the plaintiff was an un-

(a) Vol. 1, 289, 9th edit.

(b) 1 Glyn & Jam. 317.

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certificated bankrupt, and that he had issued bailable process against the defendants, who were his assignees, upon an affidavit that the defendants were indebted to him in the sum of 40,000*l.*, and upwards, for money had and received by them to his use; it being the professed object of the plaintiff to try by this mode of proceeding the validity of the commission issued against him. Upon this process, two of the defendants had been arrested, and had given bail to the Sheriff; and upon an application by them to the Chief Justice that the bail bonds should be delivered up to be cancelled on the defendant's entering a common appearance, an order to that effect was made.

It has been objected, that there is no ground for such an order, for that the bankrupt has a right to try the validity of the commission by this form of action, and, if so, has the right, like any other subject, to the security of his debtor's person; and that it is contrary to the practice of the Court to try the merits of the action on affidavits. But we think the Courts have always exercised, and have the power to exercise, a general control over the right of the plaintiff to hold to bail. Before the statute 12 *Geo.* 1, c. 29, the power of arresting depended on the practice of the Courts only, modified from time to time by rules of the Courts for that purpose. Thus, the practice of not allowing a second arrest, for the same cause of action; of not allowing an arrest, when the original debt was less than 10*l.*, but raised up to that sum by the costs of a former action; of allowing the plaintiff to hold to bail in actions of *trover* and *trespass*—have no other foundation than the rules of the Courts. And the statute above referred to, took away no authority which the Courts antecedently possessed, except that it prevented the issuing of bailable process for a smaller sum than 10*l.* The Courts, therefore, may still interpose, and accordingly, in various cases, have interposed in a summary way, and have discharged the defendant on common bail. Thus, in *Fry v.*

Malcolm (a), where the plaintiff had commenced an action on the Prothonotary's *allocatur* for costs, and had arrested the defendant, this Court, though they would not stay the proceedings, held the arrest to be bad. In *Taylor v. Higgins* (b), the Court of *King's Bench* discharged a defendant out of custody, on the ground, that the giving a new security by the plaintiff to a creditor of the defendant could not be considered as money paid to the defendant's use, upon which ground alone he had been held to bail. In *Nixetich v. Bonachich* (c), the Court of *King's Bench* discharged the defendant, where it appeared from the plaintiff's own letters that the defendant was his creditor in a considerable sum; and, in *M'Ginnis v. M'Curling* (d), the principle that such excepted cases may exist, in which the Court may interpose by their summary jurisdiction, and discharge the defendant, was fully admitted by the Court. And we think the principal case is of that description. An uncertificated bankrupt can have no property—no right of action even against third persons, unless with the assent of his assignees. How, then, can he have any as against the assignees themselves? It should be remembered also, that, before he was declared a bankrupt, the facts necessary to establish the bankruptcy must have been deposed to on oath by third persons, and the bankruptcy declared by the adjudication of commissioners sitting under the authority of an act of Parliament; and it seems unreasonable, that, upon the single and unconfirmed affidavit of the bankrupt himself, all that has been so done should be taken to have been so done without foundation; and looking at the consequences of allowing such a proceeding, we think they would be most injurious to the public; for what respectable person would become assignee to a bankrupt's estate, if, at any moment of time, he was liable to be ar-

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(a) 4 Taunt. 705.

(b) 3 East, 169.

(c) 5 Barn. & Ald. 904.

(d) 6 Dow. & Ryl. 24.

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rested for the full amount of the assets realized, merely because the bankrupt believed, to which belief his wishes would often lead him, that the commission was invalid. Without breaking in, therefore, upon the general rule, that the Court will not try the merits of a case on counter affidavits, we think this case forms an exception of so strong a nature, that all must exclaim against applying to it the general rule; and upon this ground we refuse the rule to shew cause.

Rule refused.

Monday,
 May 3rd.

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The *Brighton* paving and improvement act, 6 Geo. 4, c. clxxix. s. 255, enacts, that actions against persons proceeding under the act shall be brought within six calendar months next after the matter or thing done. The treasurer, surveyor, and contractors under the act, dug a sewer near the plaintiff's house, in consequence of which the foundation was sunk, and the walls were cracked:—*Held*, that the plaintiff's right of action was limited to six months from the day the cracks were occasioned.

THIS was an action on the case, and brought against the defendants, for an injury done to the plaintiff's house by the digging of a sewer, in consequence of which the walls of the house were cracked and injured. The fourth count of the declaration stated, that, before and at the time of the committing of the grievances by the defendants thereafter next mentioned, the plaintiff was lawfully possessed of a certain messuage, dwelling-house, and stabling, with the appurtenances thereunto belonging, called the *New Ship Inn*, situate and being in *Ship Street*, in the parish of *Brighthelmstone*, in the county of *Sussex*; which said messuage, dwelling-house, and appurtenances, he, the plaintiff, used and occupied as an inn for the reception, lodging, and entertainment of travellers and others putting up and abiding therein, and the business of an inn-keeper used, exercised, and carried on therein, to wit, at *Brighthelmstone* aforesaid;—yet the defendants, well knowing the premises, but contriving and intending to injure and agrieve the plaintiff in the use, occupation, and enjoyment of the said messuage, dwelling-house, and stabling, with

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the appurtenances, theretofore, to wit, on the 19th *February*, 1828, and on divers other days and times between that day and the day of the commencement of this suit, wrongfully and unjustly, without the leave or licence of, and against the will of the plaintiff, did, by divers wrongful and improper acts, and otherwise, wrongfully and injuriously cause and procure the foundation and walls, and other parts of the said messuage, dwelling-house, and premises, to sink, bilge, and become cracked, injured, and broken, and in danger of falling; and the said messuage and dwelling-house and premises then and there became and were rendered unfit for habitation for a long space of time, to wit, from the day and year aforesaid, hitherto; and, by means of the premises, the plaintiff had been forced and obliged to pay, lay out, and expend, and had paid, laid out, and expended divers large sums of money, amounting in the whole to the sum of 500*l.*, in repairing, supporting, and amending the foundation walls, and other parts of the said messuage, dwelling-house, and premises; and also, during all the time aforesaid, the plaintiff, his family and guests residing in the said messuage, dwelling-house, and premises, were greatly disturbed and incommoded; and also, by means of the premises, divers persons, who, at the time of the committing of the grievance last aforesaid, were boarding, lodging, and residing in the said messuage, dwelling-house, and premises of the plaintiff, to the great gains and profits of the plaintiff, left and quitted the same; and also, by means of the premises, the plaintiff had been greatly injured in his business of an innkeeper, having lost the custom and employment of divers, to wit, of one hundred travellers and guests, who would otherwise have employed the plaintiff in his said trade and business, and put up, resided, and lodged at the said messuage, dwelling-house, and premises of the plaintiff, to the great gains, profits, and advantage of the plaintiff, to wit, at *Brightelmstone*, aforesaid.—There were other counts

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for wrongfully and improperly making and digging a trench or sewer, by virtue of which the foundation of the plaintiff's house sunk, and the walls were cracked; and also counts for not shoring up the premises.

At the trial, before Mr. Justice *Gaselee*, at the last assizes for the county of *Sussex*, it appeared that the defendant *Wigney* was the treasurer appointed by the commissioners, under the statute 6 *Geo.* 4, c. clxxix, (an act for the better regulating, paving, improving, and managing the town of *Brighthelmstone*, and the poor thereof); that the defendant *Wilds*, was the surveyor, and the two other defendants were contractors for making a public sewer in a street at *Brighton* in which the plaintiff's house was situate. The plaintiff gave in evidence the following notice of action, which he proved to have been served on each of the defendants.

“To *William Wigney, Aaron Wilds, William Lambert, senior, and William Lambert, junior.*

“I do hereby give you notice, that, at or shortly after the expiration of fourteen days from the time of your being served with this notice, I shall commence an action in the Court of *Common Pleas* against you, to recover damages for the injury I have sustained by reason of your wrongful acts, to wit, that you did some time in the months of *February, March, and April*, now last past, by yourselves, your servants, or workmen, make, alter, cut, dig, work, and enlarge divers sewers, gutters, drains, and ditches, in and under a certain street in the town of *Brighthelmstone*, in the county of *Sussex*, commonly known by the name of *Ship Street*, near to and under a certain messuage or dwelling-house, stabling, and premises, in my tenure and occupation as an inn, commonly known by the name of the *New Ship Inn*, situate and being in *Ship Street* aforesaid, in so negligent, incautious, improvident, and improper a manner, that certain of the walls of the said messu-

age and premises sank and cracked, and the said messuage and premises generally became and were greatly endangered and otherwise injured; and, by reason thereof, certain persons then using the said messuage and premises as such inn as aforesaid, immediately quitted the same, and divers other persons have since omitted to use the said messuage and premises as such inn as aforesaid, who would have frequented and used the same, but for the damage occasioned in manner above mentioned; and also, that you did, by yourselves, your servants, or workmen, after the sinking and cracking of the walls as aforesaid, so insufficiently, imprudently, and unskilfully shore up and support the said messuage and premises, that I have been for many months deprived of so full and beneficial an enjoyment and occupation thereof as I ought to and otherwise would have had; and by reason of the above premises I have suffered great loss and damage.

Dated this 19th day of
September, 1828.

(Signed) *David Lloyd.*"

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The facts proved were as follows—In the beginning of February, 1828, the defendants gave the plaintiff notice that they intended to construct a sewer in *Ship Street*, in which the plaintiff's house was situate; that the sewer was dug to the depth of twenty-seven feet; and that the soil being friable and shingly, and the defendants not having supported the sides of the sewer or trench with struts across, the foundation of the plaintiff's house sank, and the walls cracked, although they had been shored up by the defendants shortly after they began to dig the sewer, and which was completed on the 16th of *March*; but the shores remained against the walls of the plaintiff's house until the middle of the month of *April* following; and the plaintiff proved that he had suffered inconvenience, by the shores preventing free access to his house after the sewer was finished; but the walls were cracked shortly after it was dug,

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and the present action was commenced on the 6th *October*, 1828, the defendants having been served with the above notice on the 19th *September* preceding.

For the defendants, it was objected—*First*, that the action had been commenced too late, as the 255th section of the act enacts that all actions brought against any person or persons, for any thing done in pursuance of the act, shall be brought within six calendar months after the matter or thing done; and that notice shall be given to the commissioners appointed under the act, of the cause or ground of action. Here, the matter or thing done, *viz.* the digging of the sewer, having been completed more than six months before the action was commenced, and there being nothing in the notice of action, or in either of the counts of the declaration applicable to the only injury the plaintiff proved he had sustained, namely, the prevention of access to his house by keeping up the shores after the completion of the sewer, he ought to have been nonsuited. *Secondly*, the notice of action ought to have been addressed to the defendant *Wigney* in his character of treasurer, or to the commissioners under the act. And, *lastly*, as the plaintiff had notice that the commissioners intended to make the sewer, before the work was commenced, it was his duty to have taken proper precautions for the safety of his house.

The learned Judge left it to the Jury to say—*first*, whether there was negligence in the construction of the sewer; *secondly*, whether the plaintiff had notice from the commissioners, as to their intention to dig the sewer so deep; and *lastly*, whether the access to the plaintiff's house had been obstructed by the keeping up of the shores after the 6th *April*, 1828, so as to bring the plaintiff's cause of action within the six months, as required by the 255th section of the act.

The Jury found a verdict for the plaintiff against all the defendants, damages 100*l.*, and said that the access to

the plaintiff's house had been obstructed by the keeping up of the shores subsequently to the 6th *April*. The learned Judge, however, reserved to the defendants leave to move to set aside the verdict, and enter a nonsuit, or that a new trial might be had, in case the Court should be of opinion that the action was not maintainable on the objections taken at the trial.

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Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*, and relied mainly on the ground, that the action was not commenced within the period limited by the act, as the only continuing damage accruing to the plaintiff was, the defendants keeping up the shores, which was not complained of in the notice, or alleged as a ground of injury in either of the counts in the declaration; and there was no ground for saying that the defendants were not fully authorized to dig the sewer, or that they had exceeded their jurisdiction in so doing. The Jury negatived the fact of their having been guilty of negligence in its construction. In the case of the Governor and Company of the *British Cast Plate Manufacturers v. Meredith* (a), where the acts of commissioners appointed by a paving act, occasioned a damage to an individual, without any excess of jurisdiction on their part, it was held, that neither they, nor the labourers employed by, and acting under them, were liable to an action. But, as the plaintiff had notice that the sewer was about to be dug, previously to the commencement of the work, it was incumbent on him to protect his own house; for, in *Peyton v. The Governors of St. Thomas's Hospital* (b), where the reversioner of a house brought an action on the case against the owner of the adjoining house, for pulling it down, without shoring up the plaintiff's house, in consequence of which it was impaired, and in part fell down, it

(a) 4 Term Rep. 794.

(b) 9 Barn. & Cress. 725; S. C. 3 Car. & Payne, 363.

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was held, that, as the plaintiff had not alleged or proved any right to have his house supported by the defendants, he was bound to protect himself by shoring, and could not complain that the defendants had neglected to do it.

Mr. Serjeant *Taddy* now shewed cause.—As no objection was made to the declaration at the trial, it is now too late to raise it; and it is a well-known and established principle of pleading, that it is sufficient for a plaintiff to describe in his declaration the main cause of the damage or injury he has sustained; and here he has alleged, that the defendants wrongfully caused the foundation and walls of his house to sink and become cracked, and in danger of falling, which might have been obviated, if the sides of the sewer had been properly secured by piles and struts, so as to prevent the loose earth from falling in, by which the foundation of the plaintiff's house was injured. The *causa causans* was the digging the sewer too deep; and in *Jones v. Bird* (a), it was held, that commissioners of sewers, and persons working by their order, in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such proper precautions for securing them, and to shore them up if necessary, as skilful persons would do; and that they were bound to give the owner of a house specific notice of the danger arising therefrom; and that a general notice to him to take proper means to secure his house, was not sufficient. There, too, the notice of action stated, that the defendants, who were contractors under the commissioners, made, altered, cut, dug, worked, and enlarged certain sewers, running under, through, or adjoining, or near to the plaintiff's house, in so negligent, incautious, unskilful, improvident, and improper a manner, that it fell down; and by the declaration and proof given, it appeared that the sewer did not run close to the plaintiff's house, but close to five

(a) 5 Barn. & Ald. 837; S. C. 1 Dow. & Ryl. 497.

other houses adjoining thereto, and that the house was damaged, and fell in consequence of the fall of a stack of chimneys of one of those houses which had been built on the arch of the sewer, and which had been insufficiently shored up by the defendants during the continuance of the work; it was held that this notice sufficiently described the cause of action, and Mr. Justice *Bayley* said (a): “A notice of this sort does not require the same precision as a declaration. It is quite sufficient if it calls the attention of the defendants to the general nature of the injury, so that they may go to the premises, and see what the ground of complaint is. If it were otherwise, it would be necessary, in many cases, to have a notice with several counts in it.” Here, the plaintiff expressly gave the defendants notice, that, after the cracking of the walls, the premises were so insufficiently shored up and supported, that he had been deprived of so full and beneficial an enjoyment and occupation thereof as he otherwise would have had; and the defendants, by placing the shores against the walls of the house, in fact admitted that they had caused the foundation to sink: they are, therefore, liable for all the consequences. But the shores were so placed, as not merely to prevent the effect of an injury which might be occasioned by the digging of the sewer, but to prevent all access to the plaintiff’s house. *Lastly*, the action was commenced in time. The thing done in the 255th section of the statute, applies to a continuing injury; and here, although the cracks in the wall were the original or primary cause of damage, yet, the keeping up the shores was a continuation of such damage; and as long as the cracks remained, the plaintiff had his right of action against the defendants. The act of commission was the digging of the sewer; the act of omission, the not shoring it up properly: and as the access to the plaintiff’s house was ob-

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(a) 5 Barn. & Ald. 845.

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structed within six months from the commencement of the action, it is an injury within the fourth count of the declaration, in which the plaintiff alleged, that the defendants did, by divers wrongful and improper acts, wrongfully and injuriously cause and procure the foundation and walls of the house to sink, bilge, and become cracked, injured, and broken, and in danger of falling; and that the house became and was rendered unfit for habitation, for a long space of time. . The plaintiff under that count proved, that the defendants had placed shores against the walls of his house, by which they admitted that some antecedent act called upon them to do so, and they injudiciously allowed them to remain, by which, as the Jury found, the access to the plaintiff's house was obstructed: and although it has been said that he should have shored up or protected his house; yet it does not appear that he had any notice that the defendants intended to dig the sewer so deep; and he had every reason to presume that they would take all such proper precautions as were necessary, and see that the sewer was properly dug, and the sides properly shored up or secured.

Mr. Serjeant *Wilde* and Mr. Serjeant *Andrews* in support of the rule.—The defendants were acting in the execution of a public duty, and under an act of Parliament for improving the town of *Brighton*, which authorized the commissioners appointed by that act to cut and make drains and sewers. A continuing damage within six months is not sufficient to give the plaintiff a right of action; there must be a continuing negligence on the part of the defendants. The Jury merely found that the access to the plaintiff's house was obstructed subsequently to the 6th of *April*; but the consequence, as proved, did not result from the nature of the work, but from the keeping up of the shores. . The plaintiff had sufficient knowledge of what was going on without any notice from the commissioners, and he was bound to take

care of his own house. But the form of the notice and of the declaration, coupled with the evidence adduced by the plaintiff, are a complete answer to his right of action; for he has not complained of an injury by the keeping up of the shores, but only that his house was insufficiently and unskilfully shored up and supported. But the walls were cracked, and the foundation sunk, more than six months before the action was brought; and a continuing damage or injury can only arise where each day brings a repetition of the injury; but the mere circumstance of the cracks remaining in the walls is not a continuing damage within the terms of the notice or the declaration. The suit, therefore, was not commenced in time; for the plaintiff's cause of action accrued on the day the walls were cracked, and the mere continuance of the cracks gave him no new right of action. In *Godin v. Ferris* (a), it was held, that an action could not be maintained against the officers of the customs for seizing goods as forfeited by the revenue laws, unless it were brought within three months after the actual seizure, notwithstanding a suit was instituted in the *Exchequer* for the condemnation of the goods, which was depending at the expiration of the three months. So, in *Saunders v. Saunders* (b), where the commander of one of the king's armed vessels seized a vessel and cargo at sea, and brought them into the next port on suspicion of smuggling; and after process in the *Exchequer*, the owner procured an order for re-delivery, under which he obtained only a part of the goods from the defendant; it was held that the owner could not maintain trover for the remainder, if the action were brought after three months from the original seizure, though within three months from the order for the re-delivery. Although, in *Roberts v. Read* (c), it was held, that though the general highway act, 13 Geo. 3, c. 78, s. 81, directs that actions against any per-

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(a) 2 Hen. Bl. 14.

(b) 2 East, 254.

(c) 16 East, 215.

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sons for any thing *done or acted* in pursuance thereof, shall be commenced within three calendar months after the fact committed, and not afterwards; yet, that, if surveyors of highways, in the execution of their office, undermine a wall adjoining to the highway, which did not fall more than three months afterwards, they were subject to an action on the case for the consequential injury within three months after the falling of the wall; yet Lord *Ellenborough* said—"It is sufficient, that the action was brought within three months after the wall fell, for that is the *gravamen*, the consequential damage is the cause of action in this case." So, here the cracking of the walls and the sinking of the foundation of the plaintiff's house were the *gravamen*, and the consequential damage arose immediately, which was more than six months before the action was brought. In *Crook v. M' Tavish* (a), where an officer in the preventive service boarded a ship, and left three men on board, and on the following morning returned and told the master he had seized her, and detained her for nearly a month, it was held that an action of trespass for the seizure must be brought within three months from the day of boarding the vessel, as the act of seizure on that day must be considered as the matter or thing done within the meaning of the statute 28 Geo. 3, c. 37, which requires all actions brought against any person for any thing done by him in pursuance of that or any other statute relating to his Majesty's customs or excise, to be commenced within three months next after the matter or thing done. So, here the matter or thing done was the causing the walls to crack, and the foundation of the house to sink. In *Massey v. Johnson* (b), which was the case of a continuing imprisonment, it was held that a magistrate is liable to answer in an action for such part of the imprisonment suffered under his warrant as was within six calendar months

(a) 8 B. Moore, 265; S. C. 1 Bing. 167.

(b) 12 East, 67.

before the action was commenced against him. So, in *Gillon v. Boddington* (a), where the *London Dock Company* undermined the wall of a wharf, in consequence of which it fell, it was held, that, as the action was brought within six months after the falling of the wall, it was sufficient, although it had been undermined two years previously. There, the plaintiff sustained a positive damage by the falling of the wall, whilst here he received none after the walls were cracked; and the only injury he proved he had sustained was by the keeping up of the shores by which the access to his house was obstructed, and which did not form a subject of complaint, either in the notice or in any of the counts of the declaration.

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Lord Chief Justice TINDAL.—It appears to me, that it is not necessary for the Court to decide on several of the points which have been raised in the course of the argument; for the main question is, whether any damage was proved to have been sustained by the plaintiff within the time limited for the commencement of his action by the 255th section of the statute, and within the terms of his notice and declaration; for, unless he bring himself within those three predicaments, this action is not maintainable. The Jury have negatived that the plaintiff sustained any damage within the six months, within which period the action ought to have been commenced, except the keeping up the shores against his house, and the consequent obstruction of access to it. The question then is, whether that particular damage is the cause of injury stated in the plaintiff's notice of action, or in his declaration. In the notice it is stated that the defendants, by themselves, their servants, and workmen, made, cut, and dug divers sewers and drains near to the plaintiff's house, in so negligent and improper a manner, that certain of the walls of the said

(a) 1 Ryan & Mood. 161.

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messuage and premises sank and cracked, and that the premises generally became greatly endangered and injured, and by reason thereof certain persons therein then immediately quitted the same, and divers other persons have since omitted to use them, who would have frequented and used them but for the damage occasioned in the manner above mentioned; and also that the defendants did, by themselves, their servants, and workmen, after the sinking and cracking of the walls as aforesaid, so insufficiently, imprudently, and unskilfully shore up and support the premises, that the plaintiff had been for many months deprived of so full and beneficial an enjoyment and occupation thereof as he ought to and otherwise would have had. That does not apply to an injury or damage resulting to the plaintiff from keeping up the shores, or not taking them away. Let us then look at the fourth count of the declaration, on which the plaintiff relies, and in which it is alleged that the defendants wrongfully and unjustly, without the leave or licence, and against the will of the plaintiff, did, by divers wrongful and improper acts, and otherwise, wrongfully and injuriously, cause and procure the foundation and walls and other parts of the said messuage, dwelling-house, and premises, to sink, bilge, and become cracked, injured, and broken, and in danger of falling; and the said messuage, &c. &c. then and there became and were rendered unfit for habitation for a long space of time, to wit, from the 19th *February*, 1828, hitherto; and that, during all the time aforesaid, the plaintiff, his family, and guests, residing in the said messuage, were greatly disturbed and incommoded; and also, by means of the premises, the plaintiff had been greatly injured in his business of an innkeeper, having lost the custom and employment of divers, to wit, of one hundred travellers and guests, who would otherwise have employed the plaintiff in his said trade and business, and put up, resided, and lodged at the said premises of the plaintiff.

Now, this certainly does not correspond with the only damage the plaintiff proved he had sustained within six months previously to the day of the commencement of this action, namely, the not removing the shores. It therefore seems to me, on this short ground, that the damage resulting to the plaintiff, after the cracking of the walls, by keeping up the shores, was not properly described either in his notice of action or in the declaration; and that, as the action was not commenced within six months from the time of the cracking of the walls, the rule for entering a nonsuit must be made absolute.

Mr. Justice PARK.—I fully agree with my Lord Chief Justice. The injury occasioned to the plaintiff by the digging of the trench or sewer was more than six months before the commencement of his action, and so was all the damage consequent upon it. The words of the 255th section of the statute are, that all actions against persons for any thing done in pursuance of the act, shall be brought within six calendar months after the matter *or thing done*, and not after the *act committed*; and although the keeping up the shores might have occasioned an injury to the plaintiff, it is not stated either in the notice or in the declaration. The fourth count alleges that the defendants did, by divers wrongful and improper acts, cause and procure the foundation and walls of the plaintiff's house to sink and become cracked and in danger of falling; but the evidence was that the only inconvenience the plaintiff had experienced after the cracking of the walls, which was more than six months before the action was brought, was by the shores obstructing the access to his house. As, therefore, the keeping up the shores was not stated as a ground of damage or injury to the plaintiff in the notice or declaration, and as the walls were cracked more than six months before the action was brought, I am of opinion that it was commenced

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too late, and consequently, that the plaintiff is not entitled to recover.

Mr. Justice GASELEE.—The only mode by which this verdict could be supported, would be on the supposition that the injury proved at the trial, within the six months, by the keeping up the shores, must be considered as part of the act done, *viz.* a damage resulting to the plaintiff from the digging or sinking of the sewer. The question then is, whether the shoring up the walls, and keeping up the shores, so as to obstruct the access to the plaintiff's house, is a continuing damage, within either of the counts of the declaration. Although I entertain some doubt on the subject, it is not so strong as to induce me to differ from the rest of the Court. There was no evidence that the house was shored up in an insufficient or unskilful manner; and the omission or neglect to remove the shores formed no subject of complaint either in the notice of action or the declaration; as in the notice the plaintiff alleged that the defendants had made and dug a sewer, in so negligent and improper a manner, that certain walls of his house sunk and cracked, and that, after the sinking and cracking of the walls, they insufficiently and unskilfully shored up and supported the premises; and in the declaration he averred that the defendants wrongfully and injuriously caused and procured the foundation and walls of his house to sink and become cracked and injured, but no mention was made as to its having been improperly shored up; and the walls were cracked more than six months before the action was brought.

Mr. Justice BOSANQUET.—I am also of opinion that this rule ought to be made absolute. Two injuries were complained of in the notice of action:—*first*, the injury done to the plaintiff's house by the digging of the sewer, and by which the walls were cracked and sunk; and, *secondly*,

by the unskilfully shoring up the premises after the sinking and cracking of the walls; and the only damage the plaintiff proved he had sustained was by the defendants' omitting to remove the shores after the sewer was completed, and by which the access to his house was obstructed. Now, the injury done to the house by the cracking of the walls was more than six months before the commencement of the action, and the mere continuance of the cracks cannot be considered as a continuing damage, for they remained the same as at first, and would have so continued for months or years. Besides, the plaintiff received no additional injury after the walls were cracked. As, therefore, the action was not brought within six months from the time the walls were cracked, and the not removing the shores formed no ground of complaint either in the plaintiff's notice of action or in the declaration, the rule for entering a nonsuit must be made—

Absolute.

SCOTT v. WATKINSON.

THIS was an action of *assumpsit* for the breach of a contract entered into by the defendant for the sale of a certain quantity of hay to the plaintiff. The declaration stated, that the plaintiff agreed to buy, and the defendant to sell, a certain stack of hay to the plaintiff, of the value of 18*l.*, to be taken away by the plaintiff within a reasonable time.

At the trial, before Mr. Baron *Vaughan*, at the last assizes for the county of *Suffolk*, the plaintiff proved that, a fortnight after the contract was made, he sent his servants to take away the hay, but that the defendant refused to let them have it. The Jury, after a strong intimation from the learned Baron that the plaintiff was entitled to recover, found a verdict for the defendant.

Mr. Serjeant *Russell*, on a former day in this Term,

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Monday,
May 3rd.

Where a verdict is under 20*l.*, the Court will not grant a new trial, although it be against evidence, and contrary to the opinion of the Judge.

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applied for a rule calling on the defendant to shew cause why this verdict should not be set aside, and a new trial had, on the grounds that it was contrary to evidence, and against the express opinion of the learned Judge. In *Freeman v. Price* (a), where the verdict was *perverse*, the Court of *Exchequer* granted a new trial, although the damages found for the plaintiff were less than 20*l.*; and after time taken to consider, Lord Chief Baron *Alexander* said, that the Court was of opinion that it was a perverse verdict, and to which the rule, with respect to the small assessment of the damages, did not apply; and the rule for a new trial was made absolute, *without* payment of costs.

The Court said, that they would communicate with Mr. Baron *Vaughan* on the subject; and Mr. Justice *Park* now said, that he had seen him, and that he said that although he should have been better satisfied if the verdict had been the other way, yet that he did not consider it so perverse as to induce the Court to grant a new trial *without* payment of costs.

Rule refused.

(a) 1 Younge & Jerv. 402.

Tuesday,
 May 4th.

CUMING and Another, Assignees of HEALE, a Bankrupt,
 v. WELSFORD and Others.

The SAME v. HARRIS and Another.

An execution
 sued out upon a
 final judgment,
 after a judgment
 by *nil dicit*, falls
 within the pro-
 viso of the 108th

section of the statute 6 *Geo.* 4, c. 16, which comprises *all* judgments by default, and cannot be restrained to judgments by default by the consent or collusion of the parties; and the words "*obtained* by default, confession, or *nil dicit*," apply to a judgment obtained *before*, as well as after, the passing of the act.

THESE were actions of *assumpsit*. The first was for money had and received, and brought by the plaintiffs, as assignees of *Heale*, a bankrupt, to recover from the de-

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defendants, execution creditors of the bankrupt, the proceeds of a sale under an execution, which had been sued out at their instance, and a levy made thereon under the following circumstances:—

The defendants, in 1824, commenced an action against *Heale*, the bankrupt, a salesman at *Plymouth*, for goods sold and delivered. On the 7th *January*, 1825, he suffered judgment by *nil dicit*; upon which a writ of inquiry was sued out, returnable on the third return of *Hilary* Term, and which was executed on the 5th *February*; final judgment was signed on the 18th *February* following; whereupon *Heale* brought a writ of error; and, in *Hilary* Term, 1826, the judgment was affirmed; upon which a *fieri facias* was sued out on the 2nd *February* in that year, under which the Sheriff's officer seized and took possession of *Heale's* goods on the 6th *February*, but, at his request, and in consequence of the illness of his wife, the sale of the goods was postponed till the 4th of *April* following, when part of his effects was sold, and the remainder on the 5th, and the proceeds of the sale were afterwards paid over to the defendants accordingly. But, as *Heale* had committed an act of bankruptcy on the 3rd of *April*, by the fraudulent transfer or conveyance of some shares in a ship of which he was part owner, to a creditor, and a commission of bankruptcy having been afterwards sued out against him, the plaintiffs, as his assignees, brought the present action against the defendants, by which they sought to recover the proceeds of the sale, alleging that the act of bankruptcy had intervened between the sale of the goods and the payment of the proceeds to the defendants.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes, at *Exeter*, the Jury found a verdict for the plaintiffs, damages 181*l.*, being the proceeds of the amount of the sale; but no leave having been reserved to the defendants to move to set aside the verdict and enter a nonsuit—

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Mr. Serjeant *Stephen*, on a former day in this Term, applied for a rule *nisi* that a new trial might be had, on the ground, that this case did not fall within the proviso of the 108th section of the statute 6 *Geo.* 4, c. 16 (a). The judgment upon which the defendants had caused execution to be sued out was not a judgment by default, but a *final* judgment *after* a judgment by default, and which was not within the words or meaning of the proviso, and, therefore, this case stands as it did at common law before the statute was passed, and the execution is protected by the general enactment in the clause in question, as having been served and levied by seizure upon the bankrupt's property before his bankruptcy. An execution creditor ought not to be divested of his rights, particularly when such execution has been sued out *bonâ fide*, and without fraud or collusion. The intention of the Legislature, in introducing the proviso, was to impose a check on voluntary preferences by means of secret securities, although the words in which it is expressed are of more extensive import. So, the policy of the exception is to do away the effect of judgments obtained by concert between a debtor and a favoured creditor to defeat the creditors at large, as in the cases of secret warrants of attorney. Here, however, there is no ground for saying, that there had been any fraud or connivance between

(a) By which it is enacted,
 "That no creditor having security for his debt, or having made any attachment in *London*, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied, by seizure upon,

or any mortgage of, or lien upon any part of the property of such bankrupt before the bankruptcy: *Provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors.*"

Heale and the defendants previously to his bankruptcy, or that the judgment was obtained with a view to defeat the general body of his creditors, as he suffered judgment by *nil dicit*, because he had no defence to the defendant's demand upon him for goods which had been delivered to him, and for which he had been unable to pay.—But even supposing that this case falls within the words or meaning of the proviso, yet it does not come within its operation, as it relates only to judgments obtained after the passing of the act; and here, final judgment was signed on the 18th *February*, 1825, and the act was to come into operation or take effect before the 1st *September* following. It is a general and well established principle, that a clause in an act of Parliament is not to be so construed as to have a retrospective operation, unless it contain express words to that effect; and here, it is quite clear that the enacting part of the clause in question applies only to executions served and levied before the passing of the act, and there is nothing in the language of the proviso to shew that it was meant to apply to pre-existing judgments, but must be confined to those which might be obtained after the act came into operation.

In *Cuming v. Harris* and Another, the defendants had sued *Heale* as the acceptor of a bill of exchange. He suffered judgment by *nil dicit* in *Michaelmas* Term, 1825, and there was afterwards a reference to the Prothonotary to compute principal and interest. Final judgment was signed on the 13th *December*, and a writ of *fieri facias* sued out and levied on such judgment on the 26th, under which certain other of *Heale's* goods and effects were seized and sold by the Sheriff. The Jury found a verdict for the plaintiffs. Under these circumstances—

Mr. Serjeant *Merewether*, on a former day in this Term, obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered; he admitted, that, as the final judgment was

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obtained after the statute 6 *Geo.* 4, c. 16, came into operation, the objection which had been raised in the former case as to that point did not apply. Still, however, the proviso of the 108th section does not apply either on principle or on policy, as the Legislature only meant it to embrace judgments obtained by concert or collusion between the parties, to the detriment of the creditors at large of the debtor; and here, the defendants, as *bond fide* creditors of *Heale*, proceeded against him in the usual course, and pursued the ordinary remedy, until they obtained final judgment, upon which the writ of execution was sued out, and the goods sold. The defendants, therefore, are entitled to retain the proceeds of that sale; and a creditor, who has levied by seizure under an execution against the goods of his debtor, may be considered as having security for his debt, by his right to have the goods sold; and if such creditor shall have proceeded, before the bankruptcy, to levy the debt by seizure of the debtor's goods under an execution, he may avail himself of such seizure to the full extent of the debt; and the proviso can only apply to creditors suing out execution on a judgment by default, confession, or *nil dicit*, and which cannot be extended to a final judgment obtained *after* a judgment by default (a).

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—

In the case of *Cuming v. Heale*, the defendants have applied for a rule to shew cause why the verdict for the plaintiffs should not be set aside, and a new trial had, on the ground that the judgment and execution upon which they rely do not fall within the proviso of the 108th

(a) See *Notley v. Buck*, 8 Barn. Ryl. 68; *Morland v. Pellatt*, 8 & Cress. 160; *S. C.* 2 Man. & Barn. & Cress. 722.

section of the bankrupt act (6 Geo. 4, c. 16); and, consequently, that the execution is protected by the general enactment of the section itself, as having been 'served and levied by seizure before the bankruptcy.' It was contended, on two distinct grounds, that this case is not governed by the words of the proviso; *first*, that this is not properly an execution on a judgment by default, but on a final judgment after a judgment by default; and even if it is to be considered as an execution on a judgment by default, the proviso includes only such judgments by default as are suffered by agreement of the parties; and, *secondly*, that the proviso relates only to judgments obtained after the act. But, notwithstanding these objections, we think the case falls within the proviso. As to the first, it is to be observed, that the words themselves comprise every species of judgment obtained against a defendant, except judgments after verdict, trial by the record, or on demurrer. The judgment, therefore, on which this execution issued, not being one of any of the latter classes, it is difficult to maintain that it does not fall within those named in the proviso. Nor does it seem less a judgment by default, because a writ of inquiry is interposed between the interlocutory and the final judgment, such suit being no more than an inquest of office to inform the conscience of the Court, who might proceed immediately to ascertain the damages, if they so thought fit. The judgment, therefore, ranging itself under the description of a judgment by default, we do not see by what principle we can restrain the very general words used in the proviso, to judgments of default by the concert or collusion of the plaintiff and defendant. It may be admitted that the primary object of the Legislature was to provide against the inconvenience felt by the creditors of bankrupts from judgments suddenly entered up and executions levied on secret warrants of attorney; and that the proviso or clause in question, which is copied from the *Irish* bankrupt act, 11 & 12 Geo. 3,

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c. 8, s. 4, was introduced principally with that object. But the Legislature, when it wished to frame enactments as to warrants of attorney, knew how to describe them by their name, as in the 3 *Geo.* 4, c. 39; and again, by using the very general words “*any judgment* obtained by default, confession, or *nil dicit*,” instead of referring to judgments on warrants of attorney, it appears to us the better inference, that more was intended to be included, and that *all judgments by default* must be intended to be comprised, particularly as in all cases concert and collusion may so easily exist, but be with so much difficulty brought to light.

As to the second objection, the words “obtained by default, confession, or *nil dicit*,” describe as well a judgment then obtained, as one to be obtained after the passing of the act; and as the act in the very same clause uses words of a future signification, *viz.* “provided that no creditor who *shall* sue out execution upon any judgment obtained, &c.,” we think, if the clause had been meant to apply to future judgments only, the Legislature would have said “to be obtained,” or have used a similar expression. And, upon such a construction, it is to be observed, that all executions issued upon judgments entered up before the 1st *September*, 1825, on secret warrants of attorney then in existence, would be protected, for which there seems no reason whatever.

On the whole, therefore, we think this execution falls within the enactment of the proviso, and that the rule prayed for by the defendants should not be granted.

The case of *Cuming v. Harris* must be governed by this decision, as the circumstances were nearly similar.

Both rules refused.

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ADAMS v. DANSEY.

THIS was an action of *assumpsit*, by which the plaintiff sought to recover a sum of money which he had paid for costs incurred in a suit for tithes, commenced against him as an occupier of lands, by the vicar, and against which costs the defendant had promised to indemnify the plaintiff.

The *first* count of the declaration was founded on a special agreement, which stated in substance, that certain disputes having arisen between the proprietors of land, in the parish of *Little Hereford* in the county of *Worcester*, and the vicar of that parish, touching certain tithes claimed by the vicar, by a certain memorandum of agreement made in the month of *June*, 1821, between the plaintiff and defendant, after setting out that the vicar had exhibited a bill in the *Exchequer* against the plaintiff and certain occupiers of lands in the parish, the defendant agreed to indemnify the plaintiff against all costs which might be incurred in defending that suit, if he would allow the defendant to defend in the name of the plaintiff. The plaintiff then averred, that he suffered the defendant to defend the suit in his, the plaintiff's, name, that it was determined in favour of the vicar, and that the plaintiff had been called on and obliged to pay the costs, amounting to the sum of 87*l.* 17*s.* 2*d.* The *second* count stated, that whereas, before the time of the making of the promise and undertaking by the defendant, as thereafter mentioned, certain disputes had arisen and were then depending between the defendant and divers other persons claiming to be proprietors of land in the said parish of *Little Hereford*, of the one part, and one *Charles Price*, the vicar

The plaintiff, an occupier of lands, having been sued by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit; upon which the defendant undertook to indemnify him from all costs of the suit, if he would suffer the defendant to defend in his, the plaintiff's, name. The vicar having succeeded in the suit, the plaintiff's attorney paid him the costs incurred before as well as after the defendant's promise of indemnity. The plaintiff afterwards gave his attorney a promissory note for the amount of the costs so paid, but which was not at maturity when he sued the defendant on his promise:—

Held, first, that this was not an undertaking to be answerable for the debt of another, or to be in writing, as required by the statute of

lands. Secondly, that there was a sufficient consideration for the defendant's promise to indemnify the plaintiff from all the costs of the suit; and *Lastly*, that the payment of such costs by the plaintiff's attorney was equivalent to a payment by the plaintiff himself, as the attorney might be considered as his agent, for the purpose of making such payment.

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of the same parish, of the other part, touching and concerning certain tithes claimed by the said *Charles Price*, as such vicar; and whereas the said *Charles Price*, as such vicar as aforesaid, before the time of the making of the promise and undertaking by the defendant thereafter mentioned, had exhibited his certain *English* bill of complaint, in his Majesty's Court of *Exchequer*, against the plaintiff and one *John Cadwallader*, then and there respectively being occupiers of divers lands in the said parish, for receiving the said tithes, so claimed by him as aforesaid, whereof the defendant had notice; and thereupon, afterwards, to wit, on &c., at &c., in consideration that the plaintiff, at the special instance and request of the defendant, would suffer and permit the defendant to defend the said suit in the said Court of *Exchequer*, in the name of the plaintiff jointly with the name of the said *John Cadwallader*, the defendant undertook and faithfully promised the plaintiff to save harmless and indemnify him from all payments, damages, costs, and expenses, which he should or might incur, bear, pay, sustain, or be liable for, by reason of the said suit in the said Court of *Exchequer* being so defended; and that he, the plaintiff, confiding in the said promise and undertaking of the defendant, did, afterwards, to wit, on &c., at &c., suffer and permit the defendant to defend the said suit in the said Court of *Exchequer*, in the name of the plaintiff, jointly with the name of the said *John Cadwallader*, and the said suit was then and there so defended as aforesaid, and had since ended and determined, to wit, at &c. The plaintiff then averred, that he, under and by virtue of a certain decree made in the said suit, was forced and obliged to pay, and did then and there pay, unto the said *Charles Price*, a certain large sum of money, to wit, the sum of 84*l.*, for certain costs and charges in the said last mentioned suit, and was also then and there forced and obliged to pay, and did pay, a certain other sum of money, to

wit, 3*l.* 17*s.* 2*d.*, being the costs of and incident to a certain attachment, then and there issued against the plaintiff out of the said Court of *Exchequer*, to compel payment of the costs of the said last-mentioned suit, whereof the defendant had notice; yet, that the defendant, disregarding his said promise and undertaking, so by him made as aforesaid, and contriving &c., to deceive and defraud the plaintiff in that respect, did not nor would, although often requested so to do, save harmless or indemnify the plaintiff from the said costs, charges, and expenses so by him the plaintiff paid as aforesaid, but had wholly refused and neglected so to do.

At the trial, before Mr. Baron *Vaughan*, at the last Summer Assizes at *Worcester*, it appeared that the plaintiff was lately an occupier of certain lands in the parish of *Little Hereford*, in the county of *Worcester*, and that the defendant was also a proprietor of lands in the same parish. That, in 1815, certain disputes had arisen between *Price* the vicar, and the proprietors of lands, as to the payment of tithes; that the latter insisted on a *modus*, which the vicar disputed, whereupon he filed a bill in the Court of *Exchequer*, in 1816, against the plaintiff and one *Cadwallader*. That the land-owners met, and resolved that the suit should be defended, and agreed, at a vestry meeting, to contribute to the expenses according to their several assessments to the poor rates; that the suit was accordingly defended by the plaintiff and *Cadwallader* until *June*, 1821, when the plaintiff gave up the occupation of the lands he held in the parish, and quitted it altogether; and having afterwards refused to continue the defence of the suit, alleging that the result could be of no benefit to him, the defendant agreed to indemnify him from the costs of defending the suit, if he, the plaintiff, would suffer the defence to be carried on in his name jointly with that of *Cadwallader*. To this the plaintiff assented, and the suit was defended accordingly. The vicar having succeeded, he, in 1823, ob-

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tained a decree against the plaintiff and *Cadwallader*, the defendants to the suit, the costs of which amounted to 87*l.* 17*s.* 2*d.*, which were paid by the plaintiff's attorneys. That sum included the costs which were incurred before, as well as after, the defendant's promise of indemnity. After the payment of those costs by the plaintiff's attorneys, he, on the 3rd *June*, 1829, gave them his promissory note at two months for the amount, which was not due at the time of the commencement of this action.

On the agreement being produced in evidence, it appeared, that it had not been signed by the defendant, on which the first count was abandoned; but the plaintiff proved that the defendant had said, that he would indemnify the plaintiff from all costs of the suit, if he would allow the defence to be carried on in the plaintiff's name jointly with *Cadwallader's*.

For the defendant, it was contended, that, under these circumstances, the action could not be sustained; as there was no valid or existing contract in writing signed by the defendant within the statute of frauds. That the payment by the plaintiff's attorneys did not support the allegation in the second count, that he had paid the costs to the vicar, as he only gave his attorneys a promissory note for the amount, which was not due or discharged at the time the present action was commenced; and that, at all events, the plaintiff could not be entitled to recover the costs incurred in the suit in the *Exchequer*, previously to the defendant's indemnity.

The Jury, however, found a verdict for the plaintiff, damages 87*l.* 17*s.* 2*d.*, the full amount of the costs. Upon which the learned Baron directed the verdict to be entered on the second count of the declaration, reserving to the defendant leave to move to set it aside and enter a nonsuit, or that the damages might be reduced to 25*l.*, being the ascertained amount of the costs incurred in the suit

in the *Exchequer*, subsequently to the defendant's offer to indemnify the plaintiff for defending that suit.

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Mr. Serjeant *Russell*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi* on the objections taken at the trial.

Mr. Serjeant *Wilde* now shewed cause.—The plaintiff is entitled to retain his verdict on the *second* count, in which he has alleged, that, in consideration that he would suffer the defendant to defend the suit in the *Exchequer*, in the plaintiff's name, jointly with *Cadwallader's*, the defendant undertook to save the plaintiff harmless, and indemnify him from all costs and expenses which he might incur or be liable for, by reason of that suit being so defended. That allegation was proved in substance, if not in terms, and the costs of the suit, payable by the plaintiff according to the terms of the decree, were his own debt, and for which he was liable at all events, as the suit was defended in his name until its final determination; and the attachment was accordingly issued against him for non-payment of the costs decreed to be payable to the vicar. But it has been said, that the defendant's indemnity was merely prospective, and could only apply to costs to be incurred in the suit after the promise was made; but, as the defendant undertook to indemnify the plaintiff from all costs he might incur by reason of the suit, it may be inferred that the plaintiff had stipulated that he should be indemnified from all costs which *had been* or might be incurred in the progress of the suit, particularly, as he allowed the defence to be carried on in his name, to accommodate the defendant, and at his express solicitation. The promise was absolute, to indemnify the plaintiff against all the costs of the suit, and the object was, to save him harmless from all costs he might be called on to pay, during the progress of or at the termination of the suit; and as

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he defended for the interest of the defendant, and the other proprietors of land in the parish, it was a good consideration for his being indemnified against the costs incurred, as well as those which might accrue subsequently to the defendant's undertaking. But, it has been objected, that the allegation in the *second* count, that the plaintiff had paid the costs to the vicar, was not proved at the trial. But he shewed that his attorneys had paid the vicar the amount of the costs decreed. They, therefore, must be considered as his agents; and a payment made by them on his account, and for his use, is equivalent to a payment by the plaintiff himself. He was clearly liable to them on his promissory note, and it is quite immaterial, as far as regards this action, whether that note were due before the commencement of the suit, as the plaintiff's attorneys had a remedy against him for money paid to his use.

Mr. Serjeant *Russell*, in support of his rule.—It is quite clear, that the defendant did not intend to be liable for the costs incurred in the suit brought against the plaintiff by the vicar, and which was in the nature of a proceeding in equity, previously to his offer to indemnify the plaintiff, as the defendant only promised to indemnify him from any costs he *might* incur, and which could not apply to by-gone costs. But the plaintiff failed to prove the averment in the *second* count, that he, by virtue of the decree in the suit in the *Exchequer*, was forced and obliged to pay, and did pay, the vicar the costs in that suit. The promissory note given by him to his attorneys was a security only, and cannot be treated as money, or considered as a payment, especially as it was not due at the time the present action was brought, when there was only a possibility that the plaintiff might be called upon by his attorneys to pay the amount of the costs. Although in *Pickard v. Bankes* (a), coun-

(a) 13 East, 20.

try bank notes were considered as money, yet all the parties agreed to treat them as such at the time they were paid over; but Lord *Ellenborough* said—"Provincial notes are certainly not money." In *Barclay v. Gooch* (a), where a person gave a promissory note for the debt of another, the creditor consented to take it in payment; and although, in *Maxwell v. Jameson* (b), Mr. Justice *Bayley* said, that that case was considered in *Taylor v. Higgins* (c), and that they were conflicting authorities; yet the latter case is expressly in point, where the Court held, that the giving of a new security which extinguished an old debt, is not a payment. So, here, there was no actual payment by the plaintiff of the costs in question, at the time this action was commenced; nor does it appear that his attorneys consented to receive his promissory note as payment, or treat it as such at the time it was given. *Lastly*, if, at the time the defendant contracted to indemnify the plaintiff, he had agreed to pay all the costs attending the *Exchequer* suit, the plaintiff could not recover, unless the agreement had been signed by the defendant; and if it be deemed to extend to the by-gone costs, it would have been a promise to be answerable for the debt of a third person, and within the statute of frauds; for the costs then incurred were due from the plaintiff and *Cadwallader* to the vicar; and, as the suit was not determined, it was uncertain whether the plaintiff would have to pay costs to the vicar, or the vicar to the plaintiff; and if the latter had succeeded, the defendant would, by the terms of his agreement, have been liable for the vicar's default, if he failed to pay the plaintiff's costs. Although, in *Read v. Nash* (d), it was held, that a promise to pay damages by a third person, in case the plaintiff would withdraw his record, was not within the statute; yet, Lord Chief Justice *Lee* said—

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(a) 2 Esp. Rep. 571.

(b) 2 Barn. & Ald. 54.

(c) 3 East, 169.

(d) 1 Wils. 305.

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“ the true difference is between an original promise and a collateral promise; the first is out of the statute, the latter is not, when it is to pay the debt of another, which was already contracted.” So here, the costs were incurred before the defendant promised to indemnify the plaintiff, for which he might have been liable or not. The promise was therefore collateral, and within the meaning of the statute. If the agreement had been confined to the payment of the plaintiff’s own costs, it would have been a different question; but, in *Winckworth v. Mills* (a), it was held, that a promise by the indorser of a dishonoured note, to indemnify the holder if he would proceed to enforce payment against the other parties, whose names were on the note, must be in writing, or that it was void under the statute. Although, in *Howes v. Martin* (b), where a party desired an action brought against another person to be defended, in which action he was concerned, and might be benefited by the event, and the action was defended, and the party failed, it was held not to be within the statute, nor was a note in writing requisite; yet, there the plaintiff had accepted bills for the accommodation of the defendant, and the plaintiff was liable for the costs at all events, as the acceptances were for the defendant’s own use, and the action defended for his benefit alone. Here, too, the agreement was entire, and the costs were not divisible. And in the case of Lord *Lexington v. Clarke* (c), where a parol agreement was entered into for the payment of the debt of another person, and also for the performance of some other act, the promise to perform which would not of itself be required to be in writing, it was held, that an action could not be maintained on such agreement, because, it being entire, it was incapable of separation, so as to enable the plaintiff to recover one part alone. So, in *Chater v. Beckett* (d),

(a) 2 Esp. Rep. 484.

(b) 1 Esp. Rep. 162.

(c) 2 Vent. 223.

(d) 7 Term Rep. 201.

it was held, that a parol promise to pay the debt of a third person, and also to do some other thing, is void by the statute of frauds, on the ground that the plaintiff cannot separate two parts of such a contract. On these grounds, the plaintiff is not entitled to recover.

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Lord Chief Justice TINDAL.—This rule was obtained on two grounds—*First*, that the defendant's promise was an undertaking within the statute of frauds, and that not having been reduced into writing, the plaintiff could not recover;—and *secondly*, that the allegation of payment by the plaintiff in the count on which the verdict was taken, was not satisfied or proved, as the plaintiff adduced no evidence to shew payment by him till after the commencement of this action. I am of opinion, that neither of these objections can be sustained. With respect to the first, it seems to me that this was not a promise within the terms or meaning of the statute of frauds. The words of that statute, as applicable to the present question, are, that “no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the *agreement*, upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing*, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.” Now, here, as between the plaintiff and defendant, what promise is there by the latter to answer for the debt, default, or miscarriage of another person? It is a direct promise on the part of the defendant to indemnify the plaintiff from all payments, damages, and costs, which he might pay or be liable for, by reason of defending the suit brought against him by the vicar in the Court of *Exchequer*. But it has been said, that, at all events, the promise is not good, nor can the plaintiff avail himself of it for costs antecedently incurred. But it was competent to the plaintiff, at the time the contract was en-

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tered into, to make any bargain he thought proper as to the price of his resisting the tithe suit for the benefit of the defendant, who, therefore, ought to be bound by his promise; and, although it might be reasonable that the defendant did not intend to be answerable for the by-gone costs, yet it will not render the contract void, nor ought it to have the effect of invalidating it altogether. With respect to the *second* objection, the question is, whether there has been any payment of money by the plaintiff for the costs incurred in the suit in the *Exchequer* before this action was brought, within the terms of the allegations in the second count of the declaration. The evidence was, that the attorneys who acted for the plaintiff and *Cadwalader* made the payment to the vicar after the determination of the suit in which he succeeded. Although it is true that the plaintiff had not supplied his attorneys with money, or repaid them, until after the present action was commenced; yet, as the party entitled to the costs had been satisfied, and could make no further claim on the plaintiff, the defendant ought not to be allowed to avail himself of such an objection. If a party making a payment draws a check on his bankers, by which his account is overdrawn, and they pay the check, it would be equivalent to a payment by the party drawing it. The plaintiff's attorneys were his agents for the purpose of paying the costs to the vicar, and he is answerable to them for the payment so made on his behalf; and it is immaterial to the defendant whether the costs were paid by the plaintiff or his attorneys. It therefore appears to me, that this rule ought to be discharged.

Mr. Justice GASELEE (*a*).—It is not necessary to determine whether proof of the promissory note given by the plaintiff to his attorneys for the amount of the costs paid

(*a*) Mr. Justice *Park* was at chambers.

to the vicar, was sufficient to sustain the allegation of the payment of those costs to him: for it appears to me that that averment was substantially proved by the payment of the whole of the costs by the plaintiff's attorneys on behalf of himself and of *Cadwallader*, who was a co-defendant in the suit in the *Exchequer*. It was a payment by the attorneys, as the agents of the plaintiff, and there is, consequently, no foundation for that objection.

With respect to the question which has been raised as to the statute of frauds, the answer has been fully given by my Lord Chief Justice. This was not a promise by the defendant to be answerable for the debt or default of a third person, but an undertaking to be answerable for any liability to which the plaintiff might be exposed, for costs and expenses which might be incurred in defending a suit at the request, and for the benefit, of the defendant. That appears to me to be a sufficient consideration for indemnifying the plaintiff even against the by-gone costs. The defendant was, at all events, liable for a portion of those costs; for, as the suit was resisted at his particular instance and request, after the plaintiff had withdrawn, it is but fair to assume that he was to be liable for those costs which the plaintiff must have paid to the vicar up to the time of the abandonment of the suit; and whether the defendant only intended to indemnify the plaintiff against the subsequent costs, might have been a question for the Jury; but it seems to me, that, as the plaintiff has alleged that the defendant undertook to indemnify him from all costs which he should be liable for in defending the suit in the *Exchequer*, in consideration of the plaintiff's suffering the defendant to defend that suit in the plaintiff's name, it extended to all the costs to be incurred in that suit, from its commencement to the termination.

Mr. Justice BOSANQUET.—I agree with my Lord Chief

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Justice and my brother *Gaselee* on both points. With respect to the objection as to the statute of frauds, there was no promise by the defendant to be answerable for the debt of another, but only to indemnify the plaintiff from all costs he might incur or be liable to pay to the vicar in consideration of the plaintiff's allowing the defendant to defend a suit in the *Exchequer*, brought by the vicar against the plaintiff, in his, the plaintiff's, name. The plaintiff, on allowing his name to be used for the benefit of the defendant, was at liberty to stipulate as to the costs which had been incurred, or to impose such terms as he thought fit, either as to the past or the future costs. The costs against which the defendant indemnified the plaintiff were, by his undertaking, due from himself to the vicar; there was, consequently, no promise by the defendant to be answerable for the debt of a third person, but only for the sum the plaintiff himself might be liable to pay for costs to the vicar on the termination of the *Exchequer* suit. With respect to the promissory note given by the plaintiff to his attorneys, the question is not whether it was treated as money by them, but, as far as regards this action, is, whether the vicar had been paid his costs. It is quite clear, that he was paid by the plaintiff's attorneys, who, for this purpose, must be considered as his agents, and a payment by them is equivalent to a payment by the plaintiff himself. When the costs were paid by the plaintiff's attorneys, he was liable to them for the amount; he was, therefore, damnified by such payment, and is consequently entitled to recover from the defendant on his indemnity as set out in the second count of the declaration, and proved in substance at the trial. This rule, therefore, must be—

Discharged.

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Wednesday,
May 5th.

WILLANS v. TAYLOR.

AT the trial of this cause, before Lord Chief Justice *Tindal*, at *Westminster*, on the 23rd *December* last, the counsel for the defendant tendered a bill of exceptions, the substance of which was reduced into writing, and given to the officer of the Court before the termination of the cause, but was not then signed or sealed by the Chief Justice. The Jury, however, found a verdict for the plaintiff, damages 200*l*.

On the 11th *February* following, the bill of exceptions, in an amended form, was settled by the counsel for the plaintiff and defendant; and, at the suggestion of his Lordship, a copy was sent to the plaintiff's attorney, in order that he might accede to its terms, or suggest alterations before it was sealed by the Lord Chief Justice. The defendant had previously sued out a writ of error in the Court of *King's Bench*, and served a rule to transcribe on the same day that the copy of the bill of exceptions was forwarded to the plaintiff's attorney. On the 22nd *February*, another copy of the bill of exceptions, in its amended state, was sent to the plaintiff's attorney. But he having taken no notice of either of those copies, the defendant, having made repeated applications without success, on the 17th *April* obtained an order of the Lord Chief Justice, calling on the plaintiff or his attorney to return the copy of the bill of exceptions to the defendant within ten days from the date of the order.

Mr. Serjeant *Cross*, on a former day in this Term, obtained a rule *nisi* that this order might be rescinded, on the ground that the defendant had waived his bill of exceptions, by bringing a writ of error before the bill of exceptions was completed and sealed; for, in *Dillon v. Doe*

The defendant tendered a bill of exceptions at the trial, and which was reduced to writing before the termination of the cause. Three weeks afterwards, at the suggestion of the Judge who presided, a copy of the bill in an extended form, was sent to the plaintiff's attorney for his approval, and on the same day, the defendant sued out a writ of error and gave a rule to transcribe:—*Held*, that it was nevertheless the duty of the plaintiff to return the bill of exceptions, although it was insisted that the defendant had waived it by bringing a writ of error.

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d. *Parker* (a), (in error), where the defendant, at the trial, tendered a bill of exceptions, and brought a writ of error before he procured the Judge's signature to the bill, the Court of *Exchequer Chamber* held, that he thereby waived the bill of exceptions, and could not be afterwards permitted to append the bill to the writ of error. Here, by the writ of error, and rule to transcribe, the record was altogether removed from this Court to the Court of *King's Bench*; and it is immaterial at what period the writ of error was brought, provided it were sued out before the bill of exceptions was sealed by the Chief Justice.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Wilde*, now shewed cause. In *Dillon v. Parker*, the application to compel the party to settle the bill of exceptions was made to the Court of error, and that Court thought that they had no authority to interfere, as the proper course was to apply to the Court of *King's Bench*, from whence the record emanated. In this case, the bill of exceptions remains in the hands of the officer of this Court, the Lord Chief Justice, therefore, has the sole control over it; for the Court of error cannot exercise any jurisdiction, until the cause be finally removed there, and which cannot be done until the bill of exceptions is sealed and appended to the record. According to the report of *Dillon v. Parker*, in *Price*, Mr. Justice *Park* and Mr. Justice *Burrough* observed that it was impossible for the Court of error to order what was required of it by the application, and that the proper course would be to apply to the Court of *King's Bench*, who might perhaps make such an order, and then the bill of exceptions might be brought up by an allegation of diminution; and Mr. Baron *Wood* was the only Judge who intimated an opinion that the writ of er-

(a) 1 Bing. 17; S. C. 11 Price, 100.

ror and removal of the record were a waiver of the bill of exceptions. But if the defendant in this case had not sued out a writ of error, he would have been liable to an execution before his bill of exceptions could have been heard. At all events, this is an application to the discretion of the Court, and if the defendant has not been guilty of unnecessary delay, he is not to be deprived of the benefit he seeks to derive from his bill of exceptions. Besides, in *Dillon v. Parker*, a year had elapsed and errors were assigned before the application was made, which was to compel the party to settle the bill of exceptions, and not to return it, as in this case. Although the bill is supposed to be annexed to the record when the Judge admits it at the trial, yet in practice it is not so; and, though it must be tendered at the trial before verdict, yet the statute of *Westminster* the 2nd, (13 *Edw.* 1), c. 31, appoints no time at which it must be tendered; and in *Wright v. Sharp*, Lord Chief Justice *Holt* said (a)—“the nature and reason of the thing require that the exception should be reduced to writing when taken and disallowed, like a special verdict, or a demurrer to evidence; not that it need be drawn up in form, but the substance must be reduced to writing while the thing is transacting, because it is to become a record.” That was done in the present case, and there has been no improper delay by the defendant, as a copy of the bill of exceptions as altered and amended was sent by him to the plaintiff’s attorney within three weeks after the trial of the cause; and it was the duty of the latter to return it at all events, whether he assented to it or not.

Mr. Serjeant *Cross*, and Mr. Serjeant *Andrews*, in support of the rule. The plaintiff has obtained a verdict. The justice of the case is clearly with him, and yet the defendant seeks to delay him from obtaining the fruits of

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(a) 1 Salk. 289.

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his verdict by removing the cause to a Court of error, by virtue of the exceptions raised on his behalf at the trial, but there is no authority to be found by which it can be shewn, that a bill of exceptions can be sealed by the Judge who presided at the trial, after the cause has been removed to a Court of error. In *Wright v. Sharp*, Lord Chief Justice *Holt* said (a)—“ You should have insisted on your exception at the trial; you waive it if you acquiesce, and you shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause on this point.” It is, therefore, not only the duty of the party raising the objection to tender the bill of exceptions at the trial, but to reduce its substance into writing, because it is afterwards to form part of the record, and its terms are not to depend on a subsequent arrangement between the parties. Besides, the defendant has been guilty of delay, and he therefore ought not to be allowed to avail himself of his bill of exceptions. The cause had been tried three weeks before the first copy of the bill of exceptions was sent to the plaintiff’s attorney. It is therefore manifest that the defendant’s principal object is delay; and Lord Chief Justice *Best* frequently said, that he would not seal a bill of exceptions unless it were tendered to him for that purpose within the first four days of the term succeeding the trial. But, after the cause has been removed by the defendant into a Court of error, he has waived his right to the bill of exceptions. His attorney might and ought to have moved the Court to stay the *postea*, till the bill of exceptions was settled and sealed, when it might have been appended or annexed to the transcript of the record.

Lord Chief Justice TINDAL.—I shall confine myself entirely to the motion now before the Court, *vis.* as to whe-

(a) 1 Salk. 289.

ther the plaintiff's attorney is bound to return the copy of the bill of exceptions in its amended state, and which was furnished to him by the defendant; I therefore abstain from giving any opinion as to whether the exceptions should be reduced into form and embodied in the bill at the time it is tendered to the Judge at the trial, nor do I look at the result, when it comes before a Court of error for their investigation or decision. The cause came on for trial, before me, on the 23rd *December*, last. Minutes of the exceptions were reduced into writing by the defendant's counsel, and tendered to me before the Jury returned their verdict. On the 11th *February* following, the bill of exceptions was presented to me in an amended form, and I suggested that a copy of it should be furnished to the plaintiff's attorney, for the purpose of ascertaining whether he would assent to it in its altered state, or whether he might wish to suggest any alteration before I affixed my seal to it. Now, it was not necessary that the bill should have been drawn up in form before the expiration of the first four days of the last *Hilary* Term, so that the utmost extent of the delay attributed to the defendant is from the 28th of *January* to the 11th of *February*. The question then is, whether that is so great a delay as to induce the Court to say, that the paper containing the exceptions, and which was sent to the plaintiff's attorney for his approval or disapprobation, might be kept or retained by him. Now, I see no reason for its retention, unless some cause be shewn for so doing, whether the plaintiff or his attorney agrees to it in its amended form or not; if he does, it will be again submitted to me; if not, and alterations be suggested, it will be for me to say whether I approve of them before I affix my seal. When I have so done, it will be for the Court of error to say, whether they will append the bill of exceptions to the record, and it is for them to determine whether it has been sealed too late. I am therefore of opinion, that there is no ground for rescinding the order, which calls on the plaintiff's attorney

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to return the copy of the bill of exceptions in its altered state to the defendant.

Mr. Justice PARK.—I am of the same opinion. I abstain from saying any thing as to the length of time between the day of the trial and the forwarding the copy of the bill of exceptions in its extended form to the plaintiff's attorney; but, on looking at the terms of the order, which merely requires the attorney to return it to the defendant, I think he is bound to do so. The plaintiff or his attorney may approve it or not, and, if they suggest any alteration, my Lord Chief Justice will exercise his judgment, and adopt it or not, as he may think proper. All the books of practice state, that, although a bill of exceptions must be tendered at the trial, and reduced to writing, yet that it need not then be drawn up in form, or sealed by the Judge who presides. When my Lord Chief Justice has sealed it, it will be for the Court of error to say whether they will admit it or not, or whether it has been executed too late. That, however, is not for us to inquire into, and I am strongly inclined to think, that the defendant, by suing out a writ of error, has not waived his right to the bill of exceptions. But it is unnecessary for us to consider that point, as the only question before us is, whether the plaintiff's attorney has a right to retain the bill of exceptions which was tendered to him by the defendant. I think he has not, and, consequently, that this rule must be discharged.

Mr. Justice GASELEE.—I confine myself to the simple question, whether the plaintiff's attorney has a right to retain the paper sent him by the defendant. I think he has not, and I do not see that an unreasonable time has elapsed between the day of trial and the day the paper containing the exceptions, in an amended form, was sent to the plaintiff's attorney for his approval or alteration. He may suggest

any amendment he may think proper. Strictly speaking, the party who tenders a bill of exceptions ought to draw it up in form within the first four days of the term next succeeding the trial, and tender it to the Judge who presided, for his approval, in order that he may seal it accordingly. If it be not completed by that time, the party who obtains the verdict may enter up judgment; but here, as the plaintiff's attorney received the paper from the defendant, he has no right to retain it. The order of my Lord Chief Justice must therefore be confirmed, and, when he has affixed his seal to the bill of exceptions, it will be for the Court of error to object to it, if they shall think it was sealed too late.

Mr. Justice BOSANQUET.—I am also of opinion that there is no ground to discharge the order of my Lord Chief Justice, which merely calls on the plaintiff's attorney to return a paper which had been sent to him by the defendant. When it is returned, whether altered or not, it will not prejudice the mind of my Lord Chief Justice, as he may adopt the alteration or not; neither will the Court of error be affected by it. At all events, the plaintiff's attorney is bound to return it to the defendant, and the rule for rescinding the order must be—

Discharged.

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Thursday,
May 6th.

The plaintiff, being in prison for debt, assigned all his effects to the provisional assignee, and was afterwards discharged under the Insolvent Debtors' Act. During the time of his imprisonment, the defendants, as agents of his landlord, broke open the outer door of his house, no one being within, and distrained his furniture for rent in arrear. The plaintiff, when he went to prison, left his wife in possession of the house, but she had left it on a visit three days before the distress was made:—*Held*, that the interest in the house being vested in the provisional assignee by the assignment, the plaintiff had not a property in the goods, or a constructive possession, so as to maintain trespass against the defendants for breaking into his house, unless he shewed that his wife had continued in possession with the assent of the assignee.

TOPHAM v. DENT and two Others.

THIS was an action of trespass, and brought against the defendants for breaking and entering the plaintiff's house, and seizing his goods and furniture, and taking them away and converting them to the defendants' own use. Plea—Not guilty.

At the trial, before Mr. Justice *Park*, at *Westminster*, at the Sittings after the last *Michaelmas* Term, it appeared that the plaintiff was a tailor, and his wife a dress-maker, and that they rented a small house of one *Imber*, in the parish of *St. Pancras*; that the plaintiff, on being sued for debt, went to *Whitecross Street* prison, the last week in *May*, 1829, leaving his wife in the possession of the house; and, on the 9th of *June*, he petitioned the Insolvent Debtors' Court for his discharge; on the 17th, all his property was assigned to the provisional assignee, and the furniture seized by the defendants was inserted in the plaintiff's schedule; and, on the 12th *August* following, he obtained an order for his discharge. On the 9th *July*, whilst the plaintiff was in prison, the defendant *Dent*, as the bailiff of *Imber*, and the two other defendants acting in his aid, went to the plaintiff's house to distrain for rent due to *Imber*, and finding the outer door closed, and no person in the house, (the plaintiff's wife having been absent three days on a visit to her mother), they procured a smith, who picked the lock. They then entered and removed all the furniture in a van, which was afterwards sold for 4*l.* 11*s.* 6*d.*, the rent in arrear being 12*l.* for half a year due at *Midsummer* preceding.

For the defendants, the case of *Doe d. Palmer v. Andrews* (a) was relied on, for the purpose of shewing that all

(a) 12 B. Moore, 601; S. C. 4 Bing. 348.

the plaintiff's interest in the premises and furniture had passed to the provisional assignee, the assignment having been made previously to the distress. The learned Judge thought, on the authority of that case, that the plaintiff was not entitled to recover, and that, under the circumstances, he had neither an actual nor constructive possession so as to entitle him to maintain trespass, nor any interest in the house or property in the goods taken by the defendants under the distress. The Jury accordingly found a verdict for the defendants.

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Mr. Serjeant *Andrews*, in the last term, obtained a rule nisi that this verdict might be set aside and a new trial had, on the ground of a misdirection by the learned Judge. There was a sufficient constructive possession of the house and furniture in the plaintiff to enable him to maintain this action, for, when he went to prison, he left his wife in the occupation of the house; and, although she quitted it for three days on a visit to her mother, yet it was her only home, and she had clearly an *animus revertendi*; and, as the defendants have only pleaded the general issue, they cannot justify the picking the lock of the outer door, and entering the house, which was an illegal act; and, therefore, the distress could not be supported by law. The plaintiff's petition and schedule were filed before the rent became due. The possession by the wife afterwards was in the nature of a new taking, and the plaintiff's discharge operated from the time of filing his petition and schedule; and, as he was only a tenant from year to year, there was no beneficial interest in the premises for the provisional assignee to take or avail himself of for the benefit of the creditors; and, as it does not appear that he ever interfered with the possession of the wife, it must be assumed that she continued in the house with his acquiescence and assent.

Mr. Serjeant *Wilde* now shewed cause.—It is quite

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clear that the landlord of the house had a right to distrain the goods found therein, for rent in arrear; and, as there was no person in the house at the time, the defendants had a right to enter and seize the goods. But, if not, after the assignment by the plaintiff to the provisional assignee, all his property was vested in the latter; and it must be assumed, that he accepted all the plaintiff's interest in the house, and, therefore, the plaintiff could not maintain any action without the consent or concurrence of such assignee. The amount due for rent far exceeded the value of the goods distrained, and they were all inserted by the plaintiff in his schedule at the time he filed his petition for his discharge. A mere irregularity in making a distress does not avoid it altogether; and here, it is quite clear that the taking was lawful, and the only grievance or subject of complaint by the plaintiff was the picking the lock of the outer door. There was no possession in fact by the wife, nor had the plaintiff any title to maintain trespass. The provisional assignee might have sued, and alleged that he had entered and become possessed of the plaintiff's interest in the house, the legal right of possession being in him. In *Crofts v. Pick* (a), this Court held, that an officer of the Insolvent Debtors' Court, who had been appointed to, and accepted the office of provisional assignee, under the Insolvent Debtors' Act (b), must, by such assignment, be taken to have consented to accept the estate and other property of the insolvent, as he had no discretion to refuse the assignment; and, in *Doe d. Palmer v. Andrews*, where a tenant from year to year, with an agreement for a lease, assigned his property to a provisional assignee under the statute 1 Geo. 4, c. 119, it was held, that he could not eject an occupier of land which passed under the assignment, although the provisional assignee had never taken possession, nor any permanent assignee been appointed, nor

(a) 8 B. Moore, 384; S. C. 1 Bing. 354. (b) 53 Geo. 3, c. 102.

had the rent ever been withheld from the lessor. That case, therefore, is an express authority to shew that the absolute interest of the plaintiff in the house and furniture passed to the provisional assignee, and that the plaintiff was not in the legal possession of the house, as his wife had quitted it when the distress was made.

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Mr. Serjeant *Andrews*, in support of his rule.—The possession of the wife is, in law, the possession of the husband; and although she had left the house for a few days on a visit to her mother, yet it is evident that she meant to return; and a mere temporary absence ought not to intercept the constructive possession, particularly, as no act had been done by the landlord or the provisional assignee, to determine the tenancy. The wife, therefore, must be taken to remain in the occupation of the premises, with the assent of the assignee, unless the contrary were shewn; and as the furniture did not amount to the value of 10*l.*; and the articles were necessary, and consisted partly of wearing apparel, they did not pass by the assignment; and although the plaintiff might have been liable to a distress for the rent due at *Lady-day*, and also responsible to his landlord for rent accruing due after that day, yet the defendants had no right to break open the door of his house. This action, therefore, is maintainable, and the plaintiff is entitled to a new trial.

Lord Chief Justice TINDAL.—I think that the verdict found for the defendants ought not to be disturbed. In order to maintain the action, the plaintiff should have had either an actual or constructive possession of the premises in question. But all the property was out of him from the 17th *June*, when it vested in the provisional assignee; and the goods were then his property, and were enumerated by the plaintiff in his schedule. Besides, the plaintiff only occupied the premises as a yearly tenant; but if he had held

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under a valuable or beneficial lease, there can be no doubt but that the term would have vested in the provisional assignee from the time of the assignment. The property then not being in the plaintiff, the only question is, whether he had possession of the house in which the goods were taken. He was in prison, and his wife was not in actual possession, for she had not been seen on the premises for three days previously to the distress being taken. As, therefore, the plaintiff had no property in the premises, a mere occasional residence by the wife would not warrant a Jury to say that there was a constructive possession in the plaintiff, with the assent of the provisional assignee.

Mr. Justice PARK.—I am of the same opinion. I not only thought at the trial that the action was most improperly brought, but am now perfectly satisfied with the finding of the Jury. The property in the goods was clearly out of the plaintiff, and he so considered it, as they were all enumerated in his schedule; and even if he had a beneficial lease of the house, the term would have vested in the provisional assignee from the time of the assignment. I concurred with the Court in *Doe d. Palmer v. Andrews*, and the decision in that case has been since recognised and approved of. If, indeed, the plaintiff's wife had been in actual and constant possession, he might, perhaps, have maintained trespass against a wrong doer; but here, he had not even a constructive possession at the time of the distress.

Mr. Justice GASELEE.—The plaintiff's interest in the house passed to the provisional assignee on the execution of the deed of assignment. If the wife had remained in possession with the assent of the assignee, the question would have been different, but there was no evidence of such assent; and it appeared that she had not been on the premises for three days previously to the distress.

Mr. Justice BOSANQUET.—I am also of opinion that this verdict ought not to be disturbed. It was a question of fact for the Jury, whether the plaintiff was in possession by the wife's continuing to reside on the premises. The Jury thought not, and I think they came to a right conclusion. This rule therefore must be

Discharged.

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BRIGGS v. SHARPE.

Saturday,
May 8th.

A RULE was obtained by Mr. Serjeant *Ludlow*, on a former day in this Term, calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the Sheriff of *Lincoln*. The motion was founded on an affidavit of the defendant, which stated, that, on the 25th *June*, 1829, he was committed in custody in execution at the plaintiff's suit, to the castle of *Lincoln*, under a warrant granted on a writ of *capias ad satisfaciendum* issued on the 22nd *June* preceding, for a debt under 20*l*. That he was brought into Court at the last Assizes at *Lincoln*, before Mr. Baron *Garrow*, to be discharged under the Lords' act, 32 *Geo. 2*, c. 28, when he was opposed by the plaintiff, and ordered to be remanded, the plaintiff, by his attorney, undertaking to pay the defendant his sixpences; but that no note or undertaking to pay the same was delivered to the defendant in Court; but that the gaoler afterwards gave him three shillings and sixpence, and subsequently gave him the plaintiff's undertaking to pay the defendant the sum of 3*s.* 6*d.* per week. It was also sworn, that no affidavit, verifying the plaintiff's signature to the note, had been served upon or delivered to the defendant.

The defendant, a prisoner in a county gaol, was brought up under the Lords' act before a Judge at the Assizes, who, after examining the note for the payment of his allowance, and the affidavit verifying the plaintiff's signature to the note, ordered the defendant to be remanded. The Court held, that the decision of the Judge was final as to the remanding the defendant, and that they had no power to interfere or direct him to be discharged, unless the party at whose suit he was in custody had not complied with the terms of the note, after the defendant had been so ordered to be remanded.

Mr. Serjeant *Goulburn* now shewed cause, on an affida-

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vit of the plaintiff's attorney, who swore that he was present and saw the plaintiff sign and subscribe the note to pay and allow the defendant three shillings and sixpence per week, weekly, so long as he should continue in prison, in execution at the suit of the plaintiff. That he was instructed by the plaintiff to oppose the defendant's application for his discharge, and that he accordingly attended the Court at the last Assizes at *Lincoln*; and when the application was made, he delivered to the proper officer the above note or undertaking so signed by the plaintiff in the presence of the attorney; and that the latter made and swore to an affidavit verifying such signature; that the note was attached to the affidavit, and handed together to the Judge who presided at the Assizes, when the application was made; and who, after examining the note and affidavit, ordered the defendant to be remanded. Under these circumstances, the learned Serjeant submitted, that this Court had no authority to interfere, as the 15th section of the statute enacts "that prisoners charged in execution in country or other gaols above twenty miles distant from *Westminster Hall* may proceed by petition and affidavit, and may be brought up at the Assizes, and the Judge is empowered to administer an oath to such prisoners, and make such order in the premises as to him shall seem meet; and to proceed in the same manner concerning the discharge of any prisoner, and to give the same judgment and relief as any Court out of which any process shall issue against any prisoner; and that every order made by such Judge shall be as valid and effectual as if the same had been made in the Court out of which the process issued on which the prisoner was charged in execution." When, therefore, the defendant was brought up before the learned Baron, he had authority either to discharge or remand him. The matter was entirely in the discretion of the Judge, and this Court cannot be consti-

tuted a Court of appeal, nor can it interpose except in default of payment of the sixpences by the plaintiff, or some other matter subsequent to the order made at the Assizes for remanding the defendant; and as it is sworn that the note and affidavit were then handed up to the Judge and examined by him, the defendant might also have inspected them, and raised any objections, or required them to be delivered to him; and the Court will now assume that what was done at the Assizes was done rightly, and there is, consequently, no ground for this application.

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Mr. Serjeant *Ludlow*, in support of his rule.—The defendant having been in custody in execution at the plaintiff's suit, for more than twelve months, and for a debt under 20*l.*, is entitled to the indulgence of the Court, and they have clearly a jurisdiction to investigate the proceedings of the Court below; he has expressly sworn that no note by the plaintiff to pay him his sixpences was delivered to him in Court; and it is further sworn, that no affidavit verifying the plaintiff's signature to the note had been delivered to the defendant; and if a note to pay a prisoner his sixpences be not signed by the plaintiff in open Court, it is the practice to require an affidavit with the note, shewing that it was duly signed. *Edwards v. Carter (a)*.

Lord Chief Justice TINDAL.—It appears to me that we have no authority to interfere in this case. The 13th section of the statute 32 *Geo. 2*, c. 28, enacts, “that, for the relief of prisoners who shall be charged in execution for any sum not exceeding 100*l.*, they may exhibit a petition to the Court, certifying therein the causes of their imprisonment, together with a schedule of their effects, and that all objections to the insufficiency of the schedule in point of form, must be made the first time the prisoner is brought

(a) M. T. 36 *Geo. 3*, K. B. Tidd's Practice, 9th Edit. 381.

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up;" and the statute 37 *Geo. 3*, c. 85, s. 3, enacts, "that in all cases where any person charged in execution for debt would have been entitled to be discharged under the provisions of the 32 *Geo. 2*, c. 28, unless their creditor or creditors would agree, as therein mentioned, to pay and allow a weekly sum not exceeding two shillings and four pence, to such prisoner, it should be lawful for the Court immediately to cause the prisoner to be discharged, upon his executing an assignment and conveyance of his estate and effects, unless the creditor or creditors insist upon his being detained in prison, and shall agree by writing, signed in the manner specified in the 32 *Geo. 2*, to pay and allow, weekly, a sum not exceeding 3*s.* 6*d.*, as any Court shall think fit, unto the prisoner, to be paid at such time, and in such manner, and upon the same terms and conditions, and under the same rules and regulations, as, by the statute 32 *Geo. 2*, is provided with respect to the allowance thereby directed to be made;" and the 18th section of that statute enacts, "that the prisoner shall be discharged, unless the creditor insist upon his being detained in prison, and shall agree, by writing, signed with his name or mark, to pay and allow the prisoner, weekly, a sum not exceeding 2*s.* 4*d.*, (now 3*s.* 6*d.* by the 37 *Geo. 3*), to be paid every *Monday* in every week, so long as the prisoner shall continue in execution; and in every such case the prisoner shall be remanded." On the construction of those clauses, the Courts have introduced as a matter of practice, that, if the note be not signed by the plaintiff in open Court, they will require an affidavit to accompany the note, shewing that it was duly signed. Here, the only question is, whether the Judge at the Assizes proceeded according to the usual and regular practice; and we must assume that he did, unless the contrary be shewn. No case has been cited, nor can any be referred to, where the Courts in *Banc* have interfered, except where matters have arisen, or the plaintiff has been guilty

of irregularities subsequently to the remanding of the prisoner. Now, it appears from the affidavit of the plaintiff's attorney, in answer to that of the defendant, that the note and affidavit, as required by the statute, were handed up to the Judge at the Assizes, and that he examined them and ordered the defendant to be remanded. It is not usual for a Judge, or the Court, to require an inspection of those documents, unless some objection had been raised to them on behalf of the prisoner. We must therefore assume, that *omnia rite acta*; and, as the Judge before whom the defendant was brought, had it in his discretion to discharge or remand him, we ought not to interfere.

Mr. Justice PARK.—I am of the same opinion, and wish it to be fully understood that the Courts are always most willing to attend to complaints made by persons in custody, and to afford them all the relief in their power. Still, however, we must not assume to ourselves a jurisdiction where we are precluded from exercising it, as in the present case; and, except for matters arising subsequently to the remanding of a prisoner, we are precluded by the 15th section of the statute 32 Geo. 2, c. 28, from interfering in a case which was exclusively within the province and jurisdiction of the Judge at the Assizes; and we must assume that he did all that was necessary before he ordered the defendant to be remanded; and I cannot conceive how the note and affidavit which accompanied it got into the hands of the learned Baron, unless some objection had been raised to them by the defendant or his counsel.

Mr. Justice GASELEE.—I am also of opinion that the power of discharging or remanding the defendant in this case, rested exclusively with the Judge at the Assizes, whose duty it was to examine all the circumstances attending his imprisonment, and to hear any objections he might

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urge; and having examined the note and affidavit, the learned Baron ordered the defendant to be remanded; and after he had been so remanded, this Court cannot direct his discharge, unless the plaintiff has made default in payment of the sixpences, or failed to perform his undertaking, according to the terms of the note. Now, it appears that the words of the statute have been strictly complied with, as far as regards the note and affidavit as to the plaintiff's signature. At all events, the Judge would have pointed out the insufficiency or defect, if any such had existed, when he required them to be handed up for his inspection.

Mr. Justice BOSANQUET.—I felt some doubt when this application was made, as the defendant swore that the note was not delivered to him in Court, but by the gaoler after his return to prison; and it was also sworn that no affidavit verifying the plaintiff's signature to the note had been delivered to the defendant. That has not been contradicted; but the plaintiff's attorney has sworn that both the note and affidavit were in Court at the time the defendant was brought up, and that the latter was annexed to the former. The words of the statute were therefore complied with; and it further appears that both these documents were examined by the learned Baron; and, after he had exercised his judgment on all the facts before him, I think we have no power to review his decision; and this rule must consequently be

Discharged.

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Monday,
May 10th.

CHALIE and Another v. BELSHAW.

THIS was an action of *assumpsit* by the plaintiffs, as drawers, against the defendant, as acceptor of a bill of exchange. The *first* count of the declaration stated, that the plaintiffs, on &c., at &c., made their certain bill of exchange in writing, and directed it to the defendant, which said bill of exchange, the defendant, on &c., upon sight thereof, accepted, according to the usage and custom of merchants. By means whereof, and according to the said usage and custom of merchants, the defendant became liable to pay the plaintiffs the sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his, the defendant's said acceptance thereof, and that, being so liable, he promised to pay. Breach—non-payment. To this count the defendant demurred specially, and assigned for causes that the count was defective and bad in this, that it is not therein stated that the defendant accepted the bill of exchange *in writing*, or that the acceptance of the same was in writing; that it is stated, that the defendant accepted the bill of exchange according to the usage and custom of merchants; and by the said usage and custom, an acceptance by parol without writing would have been sufficient; whereas, by a certain act of Parliament, made and passed in the 1st and 2nd years of the reign of king *George the Fourth*, the said acceptance of the said bill of exchange, to be valid, must be in writing. The plaintiffs joined in demurrer.

Although the 2nd section of the statute 1 & 2 Geo. 4, c. 78, requires an acceptance of an inland bill of exchange to be in writing upon the bill, yet the drawer, in an action against the acceptor, need not aver in his declaration that the acceptance was in writing.

Mr. Serjeant *Jones*, in support of the demurrer, insisted, that, as the 2nd section of the statute 1 & 2 Geo. 4, c. 78, enacts, "that no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill," it therefore rendered it ne-

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cessary for the plaintiffs to state, on the face of their declaration, that the acceptance was in writing. At all events, if it be not alleged, it is a ground of special demurrer, of which the acceptor may take advantage.

Mr. Serjeant *Wilde, contra*, was stopped by the Court.

There is no ground for the objection. If it were tenable, it would equally apply to the statute of frauds, which, in certain cases, requires an agreement to be in writing; and yet it is not necessary for the plaintiff to allege in the declaration that such agreement or contract was in writing.

Judgment for the plaintiffs.

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May 10th.

FORSTER and Another v. WESTON.

The plaintiffs having arrested the defendant, and held him to bail for 1123*l.* and consented at the trial to take a verdict for 710*l.*, they having, at the time of the arrest, a sum of 407*l.* belonging to the defendant in their hands:—*Held*, that he was entitled to his costs under the statute 43 *Geo. 3*, c. 46, s. 3, as the balance was the sum ultimately due to the plaintiffs, after deducting the latter sum, although the account on which the balance was due was a joint account between the defendant and a third person.

A RULE was obtained by Mr. Serjeant *Wilde*, on a former day in this term, calling upon the plaintiffs to shew cause why the defendant should not be allowed his costs, under the statute 43 *Geo. 3*, c. 46, s. 3, they having arrested and held him to bail for 1,123*l.*, and consented at the trial, to take a verdict for 716*l.* only. The motion was founded on affidavits, which stated, that the plaintiffs were merchants in *London*, and in the habit of receiving large consignments of timber from *Sierra Leone*, and that they were employed by the defendant and one *Claughton* to sell timber for them on commission, on their joint account; and that, although they purchased and dealt in timber jointly, they were not in fact in partnership. That the plaintiffs kept the defendant's and *Claughton's* accounts separate, and, according to an arrangement between them, paid each of them separately a moiety of the sums that be-

came due on the joint account. That the sum for which the defendant was arrested and held to bail, was the amount of the balance of an account delivered in 1829, since which the plaintiffs had received a cargo of timber on account of the defendant and *Cloughton*, the proceeds of which amounted to 814*l.*, a moiety of which they had paid over to *Cloughton*. Under these circumstances, the learned Serjeant contended, that the plaintiffs ought to have given the defendant credit for the other moiety, amounting to 407*l.*, which sum they then had in their hands; and that, as they had arrested the defendant for the whole of the balance due, it was an arrest without reasonable or probable cause, as they must have known at the time that 716*l.* only was due; and in *Dronefield v. Archer* (a), where, in an account between the plaintiff and defendant, there were items clearly due on both sides, the Court held it to be an arrest without reasonable and probable cause, within the meaning of the statute, if the plaintiff arrested the defendant for the amount due to him, without, at the same time, giving him credit for the items due on the other side of the account, and that he only ought to have held the defendant to bail for the admitted balance.

Mr. Serjeant *Taddy* now shewed cause, on affidavits which stated that disputes had arisen between the defendant and *Cloughton* as to the last cargo of timber. That the defendant was about to leave this country for *Sierra Leone* when he was arrested, and that he had a private account with the plaintiffs, as well as a joint account with *Cloughton*; but the plaintiffs did not deny that 407*l.* was due to the defendant as his moiety upon such joint account, or that they did not know that that sum was not the amount of the moiety so due at the time of the arrest. Still, however, the learned Serjeant submitted that this

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(a) 5 Barn. & Ald. 513.

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was not a vexatious or malicious arrest, nor was the defendant held to bail without a reasonable or probable cause. The disproportion between the sum sworn to, and the amount of the verdict the plaintiffs consented to take at the trial, was not so great as to induce an inference that the plaintiffs were actuated by vindictive or improper feelings towards the defendant, particularly, as they might have been misled by the joint account between him and *Claughton*, as disputes had arisen as to the last cargo of timber sold by the plaintiffs on their account, and which were not settled at the time of the arrest.

Mr. Serjeant *Wilde*, in support of his rule.—As the plaintiffs have, in terms, admitted that they had a sum belonging to the defendant in their hands at the time of the arrest, and which ought to have been appropriated in reduction of the balance of his general account, it is quite clear that they had no reasonable or probable cause for holding him to bail for the larger sum, for they must have known at the time that it was not due. This case, therefore, must be governed by the principle established in *Dronefield v. Archer*; and the Prothonotary, on taxation, ought to allow the defendant his costs.

Lord Chief Justice TINDAL.—I think this case falls within the words and meaning of the statute 43 Geo. 3, c. 46; for, after looking at the affidavits in support of, and in answer to the application, there is sufficient to satisfy us that the plaintiffs had not any reasonable or probable cause for holding the defendant to bail for the sum of 1,123*l*. If, indeed, they had sworn that they really believed they were not safe in dividing the joint account between the defendant and *Claughton* as to the last cargo of timber they disposed of on such account, the question would have been different; but they admitted that they had divided the account, and did not deny that

a moiety of the amount of the proceeds was due to the defendant at the time they caused him to be arrested for the whole of the balance of the general account.

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Mr. Justice PARK.—I am unwilling, on applications of this nature, to allow defendants their costs, where such applications are made on trivial grounds, or the amount between the sum for which a party is held to bail, and that eventually recovered, is of a trifling nature. But, where there is an existing account between the plaintiff and defendant, the balance is the sum due to the former, both at law and in equity. Although it does not appear that the balance was actually struck, yet the plaintiffs must have known that they had a sum of money belonging to the defendant in their hands, which would ultimately reduce the amount for which they caused him to be arrested, and they had no probable cause for holding him to bail for more than the balance. Although, in *Brown v. Pigeon* (a), Lord *Ellenborough* held, that an action cannot be maintained for a malicious arrest by *A.* against *B.*, if *A.* owed *B.* the sum for which he was held to bail, although *B.* was indebted to *A.* in a larger amount; yet that does not apply to a case where the accounts are mutual and unliquidated, as in *Dr. Turlington's* case (b). The Courts have of late frequently decided, that, where a defendant seeks for a remedy by an application of this nature, it is analogous to an action for a malicious arrest; and in the late case of *Donlan v. Brett* (c), where the plaintiff arrested the defendant for 575*l.*, and only recovered 89*l.* at the trial; on a motion for allowing the defendant his costs, under the statute 43 *Geo.* 3, Mr. Justice *Little-dale* said: “ The defendant is entitled to his costs, if the plaintiff had no reasonable or probable cause for arresting

(a) 2 Camp. 594.

(b) 4 Burr. 1996.

(c) 10 Barn. & Cress. 117.

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the defendant for the larger sum. It is not necessary that the arrest should have been malicious."

Mr. Justice GASELEE and Mr. Justice BOSANQUET concurring.

Rule absolute.

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The statute 8 & 9 Wm. 3, c. 11, s. 1, does not extend to an action on the case for a malicious prosecution; although the plaintiff allege in his declaration, that the defendant maliciously caused him to be apprehended by virtue of a magistrate's warrant, and to be *falsely imprisoned* and detained in prison for a long time. Therefore, where one of four several defendants was acquitted, and a verdict was entered for him accordingly:—*Held*, that he was not entitled to his costs under the above statute.

MURRAY v. NICHOLLS, TAYLOR, and two Others.

THIS was an action on the case. The plaintiff sued the defendants jointly, and the declaration contained counts for a malicious prosecution, counts for a libel, and a count in trover for a trunk. In the *first* count, the plaintiff alleged that the defendants falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be apprehended under and by virtue of a warrant of a magistrate, and to be falsely imprisoned and kept and detained in prison for a long space of time, without any reasonable or probable cause. The defendants *Nicholls* and *Taylor* pleaded the general issue to the whole of the declaration; and the two other defendants suffered judgment by default.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, the Jury found a verdict for the plaintiff, as against *Nicholls*, damages 810*l.* which they apportioned thus:—*viz.* 500*l.* on the counts for the malicious prosecution; 300*l.* for the libel; and 10*l.* on the count in trover for the trunk; but they acquitted the defendant *Taylor*, and a verdict was entered for him accordingly; and the Prothonotary having allowed him his full costs—

Mr. Serjeant *Wilde*, on the first day of this Term, obtained a rule *nisi* that the Prothonotary might review his

taxation, on the ground that such costs had been improperly allowed. Before the passing of the statute 8 & 9 Wm. 3, c. 11, if one of several defendants had been acquitted, he was not entitled to his costs, and the first section of that statute is confined to the particular actions therein mentioned, *viz.* trespass, assault, false imprisonment, or *ejectione firmæ*; and in *Dibben v. Cooke* (a), it was expressly decided, that an action of trespass on the case is not within the statute; and in *Ingle v. Wordsworth* (b), it was held, that one of two defendants in replevin was not entitled to his costs upon acquittal.

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Mr. Serjeant *Jones* now shewed cause.—The question is, whether the first count of the declaration does not bring this case within the words and meaning of the statute 8 & 9 Wm. 3, c. 11; before the passing of which, if one of several defendants had been acquitted, he was not entitled to his costs; and this being found inconvenient, the first section of that statute enacts, “that where several persons shall be made defendants to any action of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be upon the trial thereof acquitted by verdict, every person so acquitted shall have and recover his costs of suit, as if the verdict had been given against the plaintiff, and acquitted all the defendants.” Although it has been held, that this statute does not extend to an action of trespass upon the case, but must be confined to actions of trespass *vi et armis*, yet it ought to receive a liberal construction, and the Court will not scrutinize the form or language of a particular count, but look at the subject of the charge, which in this case was the maliciously causing the plaintiff to be apprehended and falsely imprisoned and detained in prison, until he obtained his discharge. If the Legislature intended that the statute

(a) 2 Str. 1006.

(b) 3 Burr. 1284.

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should only apply to cases of trespass *vi et armis*, the word *trespass* would only have been introduced; but it was meant to provide for injuries sustained by trespasses on land, or against the person; and if the words *vi et armis* are omitted in a count in trespass, it may yet be supported, unless it be taken advantage of on special demurrer; and in *Day v. Muskett* (a), Lord Chief Justice *Holt* said, that those words might be omitted altogether. In *Dibben v. Cooke*, the plaintiff brought an action on the case for a nuisance, which had no reference whatever to a trespass, assault, or false imprisonment; but here, the plaintiff has alleged in his declaration that the defendants caused him to be falsely imprisoned, without any reasonable or probable cause; and it is immaterial whether the commencement of the declaration was trespass *vi et armis*, or trespass on the case, provided the plaintiff charged the defendants with having caused him to be falsely imprisoned, and which in this case is a distinct and substantive charge. In *Ingle v. Wordsworth*, the action was replevin, which was clearly not within the words or meaning of the statute. So, in *Mariner v. Barrett* (b), the action was trover; and although Lord *Mansfield* said (c), “that all acts that give costs are to be construed strictly;” yet the statute of *William* is a remedial law, and penal only as far as it regards costs; and when false imprisonment is the subject of the action, the party complaining may waive the trespass, and bring an action on the case for the tort; and the Court will look to the injury he has sustained, rather than to the form of the action, or the language of the declaration.

Lord Chief Justice TINDAL.—The rule of construction applicable to this statute cannot be laid down with greater accuracy than by Lord *Hardwicke*, in the case of *Dibben*

(a) 2 Ld. Raym. 985.

(b) 3 Burr. 1825, n.

(c) 3 Burr. 1287.

v. Cooke, where, after consideration by the Court, his Lordship, in delivering their opinion, said—"The act extends to trespass, assault, false imprisonment, and ejectment. The present action is a trespass on the case; and though that be a species of trespass, and, in the case of the statute of limitations, the word *trespass* in the proviso has been extended to actions on the case, yet, considering these acts giving costs have always been looked on as penal acts, not to be extended by equity, and, therefore, an avowant not within the word plaintiff, *Carthew*, 179, we must take it only to mean the general sort of trespass *vi et armis*. 10 Rep. *Marshalsea case*." The question then is, whether this statute is now to be construed according to that rule, or whether the present action falls within it. The words of the act are—"Where several persons shall be made defendants to any action of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be upon the trial thereof acquitted by verdict, every person so acquitted shall recover his costs of suit, in like manner as if the verdict had been given against the plaintiff and acquitted all the defendants, unless the Judge before whom the cause is tried, shall, immediately after the trial thereof, in open Court, certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant." Now, on looking at the declaration in this case, it appears to me, that it does not come within either of the forms of action mentioned in the statute. An action for false imprisonment means an action brought directly for such imprisonment; but here, the imprisonment is only laid as matter of aggravation, and as incidental to the principal charge. It is quite clear that the imprisonment is not the gist of the action, which might have been maintained if the imprisonment had not been proved. But it appears to me to be evident that this is not a species of action within the words or operation of the statute, for, if a count in trespass for false imprison-

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ment were introduced in the declaration, it would be a misjoinder; for, the plaintiff, at the commencement, stated, that the defendants were attached to answer him in a plea of *trespass on the case*. Although, therefore, one of the defendants was acquitted, he is not entitled to his costs.

Mr. Justice PARK concurred.

Mr. Justice GASELRE.—The gist of the action was the causing the plaintiff to be apprehended maliciously, and without a reasonable or probable cause; and if the declaration had only charged the defendant with the false imprisonment, the action could not have been sustained, as the imprisonment was only incidental to the apprehension. In *Savignac v. Roome* (a), it was held that the statute 16 & 17 Car. 2, c. 8, which enacts that judgment shall not be arrested for want of the words *vi et armis* or *contra pacem*, in actions of trespass, applies only to those cases that appear on the face of the declaration to have been evidently intended to be actions of trespass, and not to a case where the memorandum is of “an action of trespass on the case.” So, the statute 8 & 9 Wm. 3, has been held to be confined to the particular actions therein enumerated, and not to extend to an action on the case.

Mr. Justice BOSANQUET.—The averment of the defendants’ causing the plaintiff to be falsely imprisoned, does not fall within the words “false imprisonment” in the statute of *William*, which only apply to a direct and immediate wrongful imprisonment, and not to an imprisonment by which the party alleges he has received a consequential damage or injury. I therefore concur with the Court in thinking that this rule must be made—

Absolute.

(a) 6 Term Rep. 125.

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*Monday,
May 10th.*

DICAS, Gent., One &c., v. JAY, Gent., One &c.

THIS was an action by the plaintiff, who lately practised as an attorney at *Chester*, against the defendant, his agent in *London*, for an alleged negligence in the conduct and management of the plaintiff's business. In 1828, the plaintiff brought a similar action against the defendant and his partner, and, on the cause coming on for trial before Lord Chief Justice *Best*, at *Westminster*, after *Easter Term* in that year, the cause, and all matters in dispute between the parties, were referred to an arbitrator, under an order of *Nisi Prius*, which was afterwards made a rule of Court; and, by the terms of the order, neither the plaintiff nor the defendant was to prosecute or bring any action or suit in any Court of law or equity against each other, of and concerning the matters referred. The arbitrator made his award in *Trinity* vacation, 1828, and found that the plaintiff had good cause of action against the then defendants for the sum of 23*l.* 14*s.* 10*d.*, and he directed a verdict to be entered for the plaintiff for that amount. Judgment was afterwards entered up, and the costs taxed and paid by the defendants. The declaration in the former cause contained several special counts, charging the then defendants with neglect of duty in various transactions during the progress of the suit; and, in the present action, the declaration contained a number of counts, in which the plaintiff alleged, by way of special damage, that, by and through the negligence and misconduct of the defendant, he had lost and been deprived of the benefit which would otherwise have arisen and accrued to him from the employment of divers persons, who would otherwise have continued to employ the plaintiff as their

The plaintiff, an attorney in the country, sued his agent in town for negligence in conducting the plaintiff's business, and alleged in his declaration that he had thereby become liable to pay certain sums, and had lost the employment of divers clients. The cause was referred under an order of *Nisi Prius*, by which the plaintiff consented not to bring any action or suit concerning the premises referred. The order was afterwards made a rule of Court, and the arbitrator directed a verdict to be entered for the plaintiff, who afterwards commenced a second action against the defendant, alleging in the declaration that the plaintiff had paid certain sums to persons who had threatened him with actions, and lost the employment of divers other clients, from the negligence of

the defendant. The Court refused to stay the proceedings in the second action on motion, but intimated an opinion that the recovery in the former action might be pleaded in bar to the latter.

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attorney in prosecuting and defending divers suits and actions at law, and otherwise in his business as such attorney; and also, that he had been called upon and actually obliged to pay certain large sums of money to divers other persons who had so employed him as their attorney, and who had threatened to commence actions against him, the plaintiff, for negligence in conducting, prosecuting, and defending divers actions and suits at law, with the conduct of which they had entrusted the plaintiff as their attorney. The declaration in the former action merely stated that the plaintiff had lost and been deprived of the benefit and advantage which might, and otherwise would, have accrued to him from the employment of certain persons who otherwise would have employed him as their attorney.

Mr. Serjeant *Cross*, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why all further proceedings in this action should not be stayed, and that the plaintiff might pay the defendant all the costs already incurred in the suit, and also the costs of this application. The learned Serjeant produced an affidavit of the defendant, which stated, that the plaintiff's claim in this action was a matter in difference in the former action, and within the scope of the order of reference; upon which it was submitted, that the award was conclusive, and precluded the plaintiff from proceeding further in this action; that the plaintiff's claim in the present action was for a matter in difference in the former suit by the plaintiff against the defendant and his partner, and which was included in the order of reference, and considered by the arbitrator before he made his award. The plaintiff, therefore, was precluded from bringing this action; and the only distinction between the two is, that, in the former action, the plaintiff only alleged in his declaration, that, through the defendant's negligence, he had lost the employment of certain persons who might and would otherwise have em-

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ployed him; whereas, here, he has alleged, by way of special damage, that he had been called upon and obliged to pay certain sums to divers persons who had threatened to commence actions against him for negligence in conducting their suits. In *Dunn v. Murray* (a), the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant in a certain capacity for a year, at the rate of five guineas *per* week throughout the year, the defendant undertook to employ him for a year, and alleged as a breach, that the defendant dismissed the plaintiff from his employ before the end of the year, without any reasonable or probable cause. The declaration also contained counts for wages, and for work and labour, &c. The cause, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages he would have been entitled to receive from the defendant on the day when the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages in consequence of the dismissal from the defendant's employ before the end of the year, it was held, that the award of the arbitrator was a bar to such action. So, the plaintiff's claim in this action was a matter in difference in the former, and within the scope of the reference; and, as Lord *Tenterden* said, in giving the judgment of the Court, in *Dunn v. Murray*, "It was the duty of the plaintiff to bring it before the arbitrator, if he meant to insist upon it as a matter in differ-

(a) 9 Barn. & Cress. 780.

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ence, and he cannot now make it the subject matter of a fresh action."

Mr. Serjeant *Wilde* now shewed cause.—The Court will not inquire, on motion, whether the plaintiff's claim on the defendant in this action was included in the former suit against him and his partner. The defendant may plead the former recovery if he think fit: but the causes of action are not substantially the same, for the plaintiff has now alleged that he *has since been called upon and obliged to pay* certain sums, which, in the declaration against the defendant and his partner, he had only stated that he *was liable* to pay. The payment of those sums since the award is a detriment to the plaintiff, and for which the present action may be sustained. Besides, he has alleged that divers persons had ceased to employ him in consequence of the negligence of the defendant, since the former suit was determined. The loss of the plaintiff's clients since the award, and the payment of money which he was compelled to make, in order to prevent the expense of actions with which he was threatened, are new causes of action; and the plaintiff has filed an affidavit, which states, that Lord Chief Justice *Best* intimated an opinion, just before the former cause was referred, that the damage now complained of might form the subject of a separate action. The Court, therefore, will not interfere summarily on a motion to stay the proceedings, but leave the defendant to his plea.

Mr. Serjeant *Cross*, in support of his rule.—The plaintiff, by commencing the present action, has been guilty of a breach of the rule of this Court, which was drawn up on reading the order of reference, and by which the plaintiff undertook not to bring any action or suit concerning the matters referred. The award was final, and where all

matters in a cause are referred, the plaintiff, as to every matter included within the scope of such reference, ought to bring forward the whole of his case. The plaintiff therefore cannot now claim to recover from the defendant for an alleged special damage accrued subsequently to the award. The loss of clients may be alleged as a new cause of action *ad infinitum*, but the plaintiff is liable to an attachment for violating the rule of the Court, which they will support, particularly as the plaintiff is one of their officers, and ought to be bound by the order of reference to which both parties assented at the trial.

Lord Chief Justice TINDAL.—This is an application to the Court, to stay the proceedings in this action, on the ground that a former action for the same cause had been referred to an arbitrator under an order of *Nisi Prius*, which order was afterwards made a rule of Court; and that, in violation of that rule, (the arbitrator having made his award and the parties acted upon it), the plaintiff has brought the present action. The application to stay the proceedings is a far milder mode than a proceeding by attachment for a contempt by the plaintiff of the rule of Court. Although the plaintiff swears, that, when the former cause was about to be referred, the late Lord Chief Justice Best expressed an opinion that the damage the plaintiff now complains of, might form the subject matter of a separate action; yet it does not follow, that it might not have been included in the first, and the arbitrator may have taken it into his consideration. If, however, under these circumstances, the defendant had applied for an attachment against the plaintiff for a contempt of the rule of Court, I am not prepared to say, that by bringing this action he would have rendered himself amenable. But, on looking at the general nature of this action, and comparing the declaration with that in the former suit, I think it

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would be an act of mercy to the plaintiff to make this rule absolute without costs. But, if he is desirous of proceeding further, we think we cannot deprive him of his right to do so, leaving the defendant to plead the special circumstances and the award, which I am strongly inclined to think would be a bar to this action, although I do not mean to express an opinion on this point.

Mr. Justice PARK.—I must confess I feel very considerable doubts whether this rule ought not to be made absolute; but, as I understand the rest of the Court concur with my Lord Chief Justice, my opinion will be of no avail.

Mr. Justice GASELEE.—On the best consideration I have been able to give this case, after comparing the declaration with that in the former suit, I am of opinion that the recovery by the plaintiff in that action may be pleaded in bar to this. I agree with my Lord Chief Justice, that it would be mercy to the plaintiff, if, after consulting with his legal advisers, he will consent to have this rule made absolute without costs. But the application to stay the proceedings is to the discretion of the Court, and I do not feel myself authorized to go the length of saying that the plaintiff has been guilty of a wilful violation of the rule of Court, which was founded on the order of *Nisi Prius*. At all events, justice will ultimately be done according to the strict rights of the parties; and if the plaintiff still insists on a further inquiry, I think we cannot prohibit him from proceeding.

Mr. Justice BOSANQUET.—The object the Court has in view in discharging this rule to set aside the proceedings in this action is, that the question between the litigant parties may be further investigated. But, before the plaintiff takes

any further step, it would be advisable for him to consider whether the terms suggested by my Lord Chief Justice, and my brother *Park*, would not, ultimately, be for his advantage.

Rule discharged without costs.

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MAXWELL, Clerk, v. MARTIN.

Monday,
May 10th.

THIS was an action of trespass *quare clausum fregit*. The plaintiff in his declaration alleged, that the defendant, on &c., &c., at &c., with force and arms, &c., broke and entered a certain close of the plaintiff, called the *Lord's Leys*, situate &c., and trod down, trampled upon, and consumed the grass and herbage of the plaintiff, there growing and being, and dug up the soil of the said close, and threw up divers large mounds of earth, and there left the same, to the damage of the plaintiff of 300*l*. Plea—that the supposed close, called the *Lord's Leys*, in the declaration mentioned, is, and at the said several times when &c., was an open waste, and part of a certain common called *Brockridge Common*; and that the defendant, and all those whose estate he hath, were seised in fee of a certain messuage or tenement in the parish in which *Brockridge Common* was situate, and had a prescriptive right to dig, take, and carry away stone from the open waste and uninclosed parts of *Brockridge Common*, and in, upon, and from the said close or parcel of land called the *Lord's Leys*, as being an open waste and uninclosed part of *Brockridge Common*, for the purpose of repairing the defendant's messuage. The defendant then averred, that,

To a declaration of trespass for breaking and entering the plaintiff's close called *L.*, the defendant pleaded, that the close was part of *B. common*, and that the defendant had a right to dig and take stone from the common, and from close *L.*, as being part of *B. common*. The plaintiff, in his replication, after protesting that close *L.* was not part of *B. common*, alleged that the defendant had no right to dig or take stone from close *L.*; upon which issue was joined. At the trial, the plaintiff admitted that the defendant had a right to dig and take stone from *B. common*, with the excep-

tion of close *L.*, and the defendant admitted that he had no evidence to prove the exercise of a right to take stone from that close. A verdict having been entered for the defendant, the Court directed it to be set aside and entered for the plaintiff, as the defendant had not proved the affirmative of the issue, viz. that he had a right to dig and take stone from close *L.*

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at the time when &c., his messuage was out of repair, and that he entered the close called the *Lord's Leys*, and dug and took away stone for the purpose of such repairs. The plaintiff, in his replication, after protesting that the *Lord's Leys* was not an open waste and uninclosed part of *Brockridge* Common, alleged, that the defendant, and all those whose estate he had, had not a right to dig, take, and carry away stone from the close or parcel of land called the *Lord's Leys*, for the purposes by the defendant in his plea mentioned: and upon which issue was joined.

At the trial, before Mr. Baron *Vaughan*, at the last Assizes at *Gloucester*, the defendant's counsel admitted that he had no evidence to prove the exercise of a right to take stone in the close called the *Lord's Leys*; and, on the other hand, the plaintiff's counsel admitted that the defendant had a right to dig stone upon *Brockridge* Common, with the exception of that part of it which was called the *Lord's Leys*. The learned Baron, being of opinion that, on those admissions, there was no fact in dispute between the parties for the consideration of the Jury, directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to set it aside, and that a verdict might be entered for him with one shilling damages.

Mr. Serjeant *Russell* having in the last *Michaelmas* Term obtained a rule *nisi* accordingly—

Mr. Serjeant *Ludlow*, on a former day in this term, shewed cause.—As the defendant has not pleaded the general issue, and the plaintiff has not traversed his right to dig and take stone from *Brockridge* Common, he has in fact admitted it on the face of the record, independently of the admission made by his counsel at the trial. Although the plaintiff has protested in his replication that the close called *Lord's Leys* was not a part of *Brockridge*

Common, yet it has nothing whatever to do with the matter in issue between the parties, for the only possible use of a protestation is, that in case the plaintiff should succeed in the point to be tried, he would reserve to himself the liberty of disputing in any other suit the truth of the allegation which is protested against. It is a well known and established rule of pleading, that every traversable matter alleged by one party, and not denied by the other, must be taken to be admitted by the party who might have traversed it. Here, the allegation by the defendant that *Lord's Leys* was part of *Brockeridge Common* was most material; and, as the plaintiff has not traversed it, he has in fact admitted that the defendant had a right to dig and take away stone from *Brockeridge Common*, and which involves the admission of a right to dig and take stone from *Lord's Leys*, as part of the common. The plaintiff, therefore, cannot be entitled to have a verdict entered for him, as no judgment can be entered for him on the record as it now stands; and, if he has tendered an immaterial issue, the Court will award a repleader. In *Rotherham v. Green* (a), it was held, that, as a right to common is entire throughout the whole of the lands subject to it, if the commoner release any part of the land from his right of common, it will operate as an extinguishment of the right in every other part. In *Morewood v. Wood* (b), it was decided, that, if a prescriptive right be pleaded, the whole, and not a part only, must be traversed by the replication; and Mr. Justice *Ashurst* said: "All prescriptions are in their nature entire; and, when they are pleaded, the adverse party cannot deny a part only, but must either demur or traverse the whole;" and Mr. Justice *Grose* said: "Every prescription is founded on a grant, and part of a grant only cannot be traversed. Besides, this mode of pleading is for the plaintiff's advantage; for, unless the

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(a) Cro. Eliz. 593.

(b) 4 Term Rep. 157.

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defendant prove the whole prescription as it is laid, he must fail." In *Tyrwhitt v. Wynne* (a), where, in trespass for pulling down a wall, the issue was, whether certain common land was the soil and freehold of the lord of the manor, on which the plaintiff was entitled to a right of common, or the soil and freehold of the plaintiff: it was held, that leases of minerals granted by the lord to other persons in other parts of the uninclosed waste land, were not receivable in evidence, unless it were first shewn that the *locus in quo* formed part of one entire waste, and to which those leases were applicable; and Mr. Justice Bayley said: "When once it has been established that the *locus in quo* is part of one entire district, honour, or manor, it is competent to give in evidence acts done on other parts of that district, honour, or manor, in order to shew a right to the *locus in quo*." In *Stanley v. White* Mr. Justice Le Blanc said (b): "The freehold of wastes is continually asserted by evidence of acts of ownerships in different parts." In *Rowe v. Brenton* (c), where, in each of several manors belonging to the same lord, and part of the same district, it appeared that there was a class of tenants answering the same description, and to whom their tenements were granted by similar words:—it was held, that evidence of what rights had been enjoyed by those tenants in one manor, might be received to shew what were their rights in another. In *Grose v. West*, Lord Chief Justice Gibbs said (d): "*Primâ facie*, the presumption is, that a strip of land lying between a highway and the adjoining close belongs to the owner of the close; as the presumption also is, that the highway itself, as *medium filum viæ*, does. But the presumption is to be confined to that extent; for, if the narrow strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either

(a) 2 Barn. & Ald. 554.

Man. & Ry. 133.

(b) 14 East, 342.

(d) 7 Taunt. 41.

(c) 8 Barn. & Cress. 758; 3

done away, or considerably narrowed; for the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them." These authorities, therefore, establish the position, that evidence of ownership, or of exercising a right over some parts of a waste or common, is, until rebutted, evidence of a right over the whole; and, therefore, as the plaintiff has not traversed the defendant's right to take stone from *Brockridge Common*, but further admitted that he had a right to dig stone there, it must be assumed that the defendant had a right to dig and take stone from the *Lord's Leys* as part and parcel of *Brockridge Common*.

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Mr. Serjeant *Wilde* and Mr. Serjeant *Russell*, in support of the rule.—The only point in issue between the parties was, whether the defendant had a right to dig and take stone from the close called the *Lord's Leys*; and, although it has been insisted for the defendant, that the plaintiff, by his replication, has admitted that he had such right, as he did not traverse his right to take stone from *Brockridge Common*; yet, as the plaintiff merely admitted that the defendant had a right to dig stone on the common, with the exception of the *Lord's Leys*, it was incumbent on the latter to shew that he had exercised his right in that close; but, at the outset, his counsel admitted that he had no evidence to prove that fact. If the defendant had shewn that he had a general right to dig stone on the common, the question would have been different, but he disclaimed such right as to the *Lord's Leys*. Although it is said, that the plaintiff's traverse is more narrow than it ought to be; yet, where the defendant's plea extends to something else, as well as the matter in the declaration, the plaintiff may narrow his traverse, and confine it to that which is an answer to the declaration; as, if, in trespass in *A.*, the defendant pleads a right of common *pur cause de vicinage* in *A.* and *B.*, the plaintiff may traverse the

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right in *A.* only, without traversing the right in *B.* *Griffith v. Williams* (a). In *Harpur v. Painter* (b), to an action of trespass *quare clausum fregit*, the defendant pleaded, that the *locus in quo* was parcel of a large waste, and that the waste was the soil and freehold of *B.*, and justified as his servant, and the plaintiff replied that the *locus in quo* was the soil and freehold of *P.*, and not the soil and freehold of *B.*, and the defendant demurred specially, assigning for cause that the replication contained no traverse of any thing asserted in the plea, but of what was merely argumentative. Lord *Mansfield* said, after argument: "The point in dispute is, whether the *locus in quo* be the soil and freehold of *B.* It is nothing to the plaintiff, whether the *whole waste* belongs to *B.* Is not the assertion that the whole is his, an assertion that every part is so?" And the Court were unanimous against the demurrer, which the defendant was afterwards allowed to withdraw. In *Morewood v. Wood*, which was an action of trespass for breaking and entering the plaintiff's close, called *S. C.*, and digging stones therein, and the defendant pleaded that there were certain wastes lying open to one another, one, the close in which &c., and the other called *S. G.*, and prescribed for the liberty of digging stones in both closes, and so justified, and the replication traversed the prescription in *S. C.* only, and the rejoinder tendered issue on the prescription in both closes, and the plaintiff demurred; the Court held that he could not narrow his traverse by confining it to the prescription in *S. C.* only, but was bound to traverse the whole prescription:—yet the prescription was in its nature entire, and therefore could not be denied in part, but the whole must be traversed. Here, however, the only issue was, whether the defendant had a right to dig and take stone from the

(a) 1 Wils. 339.

(b) MS. 18 Geo. 3, K. B., 1 Wms. Saund. 268 a, n. (1).

Lord's Leys; and he admitted that he had no evidence to prove the exercise of such right.

[Lord Chief Justice *Tindal* said, that, as the record and admissions made by the parties at the trial raised a question of some difficulty, he would consult with Mr. Baron *Vaughan* as to what took place before him, before the Court gave any opinion.]

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Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

Upon the pleadings in this case, the precise issue raised by the replication is, whether the defendant has a prescriptive right to dig stone in, upon, and from a close called the *Lord's Leys*; and it is admitted on the face of the pleadings, for the purpose of this cause, that the *Lord's Leys* was, at the time of the trespass committed, an open waste and uninclosed part of a certain common, called *Brockridge Common*. The cause, instead of being tried by the actual production of evidence before the Jury, was brought to a termination by the admissions of the counsel on each side; the counsel for the defendant admitting that he had no evidence to prove the exercise of a right to take stone on the *Lord's Leys*, and the counsel for the plaintiff admitting that the defendant had a right to dig stone upon *Brockridge Common*, with the exception of the close or part called the *Lord's Leys*, it being understood, according to the report of the learned Judge who tried the cause, that there was no fact in dispute between the parties for the consideration of the Jury. On this state of the pleadings, and this mutual understanding of the condition in which the parties stood as to the evidence, a verdict was entered for the defendant, with liberty for the plaintiff to move that it might be set aside and a verdict entered for him for one shilling damages, which is now sought to be done, on the rule obtained for that purpose, and which rule, we think, ought to be made absolute. The

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original grant of the right of digging stones upon *Brock-
eridge* Common, on the foundation and in the place
of which grant the prescription now stands, might either
have been a general grant to dig stone over the whole
common, or a grant to dig stone over the whole common,
with the exception of the *Lord's Leys*. But the affirma-
tive of the issue is upon the defendant; and he must shew
affirmatively, either that the original grant, or the pre-
scriptive right set up in the plea, comprehends the whole
common without any exception. So that, if the ori-
ginal grant cannot be produced, and the evidence as to
the prescriptive right over the part called the *Lord's Leys*
hangs in even scales, the balance must be declared in fa-
vour of the plaintiff, inasmuch as the burden of making
the scale preponderate is cast upon the defendant. Now,
if the case had gone to the Jury upon the actual produc-
tion of evidence, the right to take stones upon the *Lord's
Leys* would have depended not merely on affirmative evi-
dence of the exercise of that right on the particular spot;
but, as the defendant had evidence of the exercise of the
right of getting stone on the whole of *Brock-eridge* com-
mon, the Jury might have inferred the right as to the par-
ticular spot in dispute, from the mode and circumstances
under which the right was exercised over the residue of
the common, and not exercised as to the *Lord's Leys*.
Thus, the situation of the *Lord's Leys*, the quantity and
value of the stone under it, and its accessibility or conve-
nience with respect to the tenement of the defendant, or
the premises where the stone was used, might have been
important evidence, either to support or to negative the
inference as to the exception of the *Lord's Leys* from the
original grant, or from the prescriptive grant. But as this
was well known to the counsel on both sides, we take the
admissions made at the trial as a general admission, not
only that there was no direct affirmative evidence to sup-
port the issue as to the *Lord's Leys*, but none that would

raise an inference in support of it; and therefore, upon the whole, we think the defendant has not proved his issue, and that the rule for entering a verdict for the plaintiff must be made—

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Absolute.

FRY, on the demise of THOMAS THOMAS, v. GRIFFITHS.

Monday,
May 10th.

THIS was an action of ejectment. At the trial, before Mr. Serjeant *Goulburn*, at the last Summer Assizes at the Great Sessions at *Pembroke*, the lessor of the plaintiff claimed the premises in question under a lease from the mayor, bailiff, and burgesses of *Tenby*, dated the 22nd September, 1788, and by which the premises were demised to him for the term of three lives.

In ejectment, one of the plaintiff's witnesses stated, on cross-examination, that he had prepared an agreement or lease in writing, between the plaintiff and *A. T.*, relative to the premises sought to be recovered, and that he had heard the latter say, that he held the premises under the plaintiff, but not that he held under the agreement: —*Held*, that nevertheless the plaintiff was bound to produce the agreement, as its existence was shewn by one of his own witnesses.

The lease was put in and read, and the lessor of the plaintiff then called a witness to prove that the defendant succeeded one *Alexander Thomas*, who occupied the premises under the plaintiff, before the defendant took possession, and through whom he claimed. The witness, in the course of his cross-examination, stated, that he had drawn an agreement or lease in writing between the lessor of the plaintiff and *Alexander Thomas*, relative to the premises in question; and that he, the witness, had frequently heard *Alexander Thomas* say, that he held the premises under the lessor of the plaintiff; but that he never heard him say any thing about the agreement or lease. The plaintiff then proved that he had served the defendant with a notice to quit the premises on the 23rd September, 1828, which the defendant read, and did not object to.

For the defendant, it was insisted, that, as the plaintiff's witness had proved that *Alexander Thomas* held the premises under an instrument in writing, which the witness had prepared, the plaintiff could not be entitled to recover

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without the production of that instrument; and the case of *Brewer v. Palmer* (a), was referred to, where Lord *Eldon* ruled, that if premises are held under an agreement in writing, although it be not stamped, the plaintiff cannot give parol evidence of the demise. The learned Serjeant, however, directed a verdict to be entered for the lessor of the plaintiff, reserving leave to the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion that the agreement alluded to by the plaintiff's witness, should have been produced.

Mr. Serjeant *Russell*, on the authority of *Brewer v. Palmer*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*, and submitted, that, as the plaintiff's own witness had proved that *Alexander Thomas*, through whom the defendant acquired possession, had held the premises under a demise in writing, the plaintiff ought to have produced it, as being the best evidence of the terms of the holding, and the duration of the term *Alexander Thomas* had in the premises.

Mr. Serjeant *Ludlow* now shewed cause.—The lessor of the plaintiff having proved his title to the premises in question, by the production of the lease to him from the corporation of *Tenby*, it was not necessary for him to produce the instrument adverted to by one of his witnesses, unless it appeared to be an existing agreement or lease, at the time of the trial. It might have been a demise for a year only, or for a term which had long since expired; and the defendant never acknowledged its existence, nor did *Alexander Thomas* ever state that he held under it. But, as the defendant had been served with a notice to quit, and raised no objection to it at the time, it amounted to a recognition that he held under the lessor of the plaintiff,

(a) 3 Esp. Rep. 213.

or the person whom he represents. In *Brewer v. Palmer*, the action was use and occupation; and, on one of the plaintiff's witnesses stating that there was an agreement in writing, which contained the terms under which the defendant held, Lord *Eldon* most properly held, that the plaintiff ought to produce it, as it was a specific contract between him and the defendant, and that it might contain some clauses which might prevent the plaintiff from recovering, and others for the benefit of the defendant. Here, however, there was no question as to the terms of the agreement, nor did it appear that it was a subsisting agreement, or that the defendant had derived any interest under it. The plaintiff proved a *prima facie* title to the premises; and it was incumbent on the defendant to shew, not only that he had acquired an interest from *Alexander Thomas*, but that, if the agreement were in existence, it was still in force.

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 v.
 GRIPPITS.

Mr. Serjeant *Russell*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—I think it was incumbent on the lessor of the plaintiff to have produced the agreement or lease which his own witness stated that he had prepared. The plaintiff's claim was adverse to the defendant, and the question was, whether the term granted to *Alexander Thomas* had expired; and when it appeared that a demise in writing had been prepared, relating to the premises in question, it should have been produced, as being the best evidence of the terms on which *Alexander Thomas* held.

Mr. Justice PARK.—Although the defendant was served with a notice to quit, and raised no objection to it at the time of the service, yet, as the plaintiff's witness stated that there was an agreement in writing between

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the lessor of the plaintiff and *Alexander Thomas* relating to the premises in question, and the defendant claimed through the latter, I think the instrument ought to have been produced; and, as the plaintiff failed to do so, he ought to have been nonsuited.

Mr. Justice BOSANQUET (a).—I am of the same opinion. The plaintiff's own witness stated that he had prepared an instrument in writing between the lessor of the plaintiff and *Alexander Thomas*, to whom the premises were demised; and, as that instrument ought to have been produced, and the witness stated that he had heard *Alexander Thomas* say that he held under the lessor of the plaintiff, the rule for entering a nonsuit must be made—

Absolute.

(a) Mr. Justice Gaselee was at Chambers.

Wednesday,
 May 12th.

FORD v. BERNARD.

The defendant pleaded *non assumpsit* to a declaration in debt, and gave a notice of set off. The plaintiff afterwards took out a summons for particulars of the set off, which being delivered, he signed judgment as for want of a plea—*Held*, that as the plea was a nullity, the demand of the particulars of set off was not a waiver of the irregularity, and that the plaintiff was, nevertheless, entitled to sign judgment.

THIS was an action of debt, and brought to recover the sum of 6*l.* 1*s.* The declaration delivered to the defendant contained the common money counts. The defendant pleaded *non assumpsit*, which plea was delivered to the plaintiff's attorney, together with a notice of set off. The plaintiff afterwards took out a summons for particulars of the set off, which were delivered accordingly, after which the plaintiff signed judgment as for want of a plea, and sued out execution accordingly.

Mr. Serjeant *Bompas*, on a former day in this Term, obtained a rule *nisi* that this judgment and execution might be set aside. He produced an affidavit of the defendant's attorney, who deposed, that the plea of *non assumpsit* had been delivered by mistake, and that he verily believed that the defendant had a good defence upon the merits.

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The learned Serjeant submitted that the plaintiff ought not to have treated the plea as a nullity, but have demurred, or applied to the Court to set it aside. But as he took out a summons for the particulars of set off after the plea was delivered, it was a waiver of the irregularity. The judgment was therefore improperly signed, and the defendant ought not to be deprived of his defence, particularly, as it is sworn that he has a defence on the merits.

Mr. Serjeant *Wilde* now shewed cause.—In *Brennan v. Egan* (a), it was decided, that the plea of *non assumpsit* to a declaration in debt may be treated as a nullity. The plaintiff was therefore entitled to sign judgment for want of a plea; and, although it has been said, that he has waived the irregularity by requiring particulars of the set off, yet, in *Hussey v. Wilson* (b), the Court drew a distinction between a mere irregularity and a complete defect in the proceedings, which cannot be waived or cured. The case of *Perry v. Fisher* (c) is also an authority to shew that the plea of *non assumpsit* to an action of debt, is a nullity, and altogether void.

Mr. Serjeant *Bompas*, in support of his rule.—In *Margerum v. Makihwaine* (d), it was held, that if a plaintiff take a plea out of the office, and keep it, he waives any objection to the plea, although it was irregularly pleaded; and here, as the plaintiff demanded particulars of

(a) 4 Taunt. 164.

(b) 5 Term Rep. 254.

(c) 6 East, 549.

(d) 2 New Rep. 509.

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—
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the set off after the plea was delivered, it was a waiver of the irregularity. But, as the defendant's attorney has sworn to merits, the Court will allow the cause to be tried upon some terms, and justice would be done by allowing the defendant to withdraw his plea and plead *nil debet*, on payment of costs, and putting the plaintiff in the same situation as if that plea had been pleaded in the first instance.

Lord Chief Justice TINDAL.—It appears to us that the judgment in this case has been regularly signed, because the defendant has put in a plea which is not adapted to the nature of the action; and this Court held, in the case of *Brennan v. Egan*, that a plea of *non assumpsit* to a declaration in debt is a nullity, and that the plaintiff may so treat it, and sign judgment as for want of a plea. But it has been said, that, although the plea be a nullity, the plaintiff has waived the irregularity by having taken out a summons for particulars of the set off, after the delivery of the plea. It must be recollected, that the defendant gave a notice of set off, and did not plead it, which makes a most material distinction, for the notice forms no part of the record. In *Hussey v. Wilson*, the Court admitted the distinction taken by counsel between a mere irregularity in the mode of proceeding, and a defect in the proceedings themselves, and which has ever since been adopted. In *Margerem v. Makilwaine*, the only irregularity was, that the plea was put in, in the name of a different attorney from the attorney by whom the defendant had appeared, without any order for changing the attorney. But it has been pressed upon us that we ought to allow the defendant to proceed to trial, as he has produced an affidavit of merits. But, when we see that the action is brought to recover the trifling sum of 6*l.* 1*s.*, and that the defendant must pay all the costs incurred by the plaintiff before he can set aside the judgment;

and we further consider, that he must incur far greater expenses before he can try the cause; we think, in mercy to him, that the rule ought to be discharged:—but it appears to us that the justice of the case would be best answered by referring the whole of the matters to the Prothonotary, the costs to be in his discretion.

Mr. Serjeant *Bompas* assented to this proposal, and the rule was accordingly—

Discharged.

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THIS was an action of debt on bond, in the penal sum of 2000*l.*, conditioned for the payment of 1000*l.* The defendant, after craving oyer of the bond and condition, pleaded, that, after the making of the said writing obligatory, to wit, on the 14th *November*, 1828, to wit, at &c., by a certain deed poll, or writing of release, sealed with the seal of the plaintiff, which said deed poll the defendant now brings into Court here, the date whereof is the same day and year last aforesaid, after reciting that under and by virtue of a certain deed of settlement or other instrument made upon the marriage of *Isabella Morley*, the then wife of the plaintiff, with one *William Holgate*, deceased, her former husband, and under and by virtue of the last will and testament of *William Holgate*, the plaintiff was or would become entitled (in right of the said *Isabella* his wife, on the decease of her father, the defendant) to the principal sum of 750*l.*, being one moiety or half part

The plaintiff declared in debt on a bond conditioned for the payment of 1000*l.* The defendant, in his plea, set out a deed poll, which, after reciting that the plaintiff would become entitled, on the decease of the defendant, to 750*l.*, in right of the plaintiff's wife, by virtue of a deed of settlement on her marriage, and that the defendant had given a bond to the plaintiff for 1000*l.* (the bond declared on), the plaintiff and his wife

released the sum of 750*l.*, and the plaintiff covenanted that he would not require payment of the 1000*l.* secured by the bond, nor claim interest for the same during the life of the defendant; and that, in case the bond should be assigned by the plaintiff, and the defendant should be required by the assignee to pay the principal, the plaintiff would pay the defendant interest for the same during the defendant's life:—*Held*, that the deed poll did not operate as a defeasance of the bond, and, consequently, that it was no answer to an action by the assignee in the name of the obligee.

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of the sum of 1,500*l.*, which, by such deed of settlement, or other instrument as aforesaid, the defendant had covenanted or otherwise bound himself, that his heirs, executors, or administrators, should pay after his decease, unto the said *William Holgate*, his executors, administrators, or assigns, and which, under and by virtue of the said will of him the said *William Holgate*, would become divisible between the said *Isabella Morley*, and her son *William Frear Holgate*, in equal moieties or proportions; and after further reciting, that the defendant, in and by a certain bond or obligation, bearing even date therewith, (being the said writing obligatory as in the said declaration is mentioned), became bound unto the plaintiff, his executors, administrators, and assigns, in the penal sum of 2000*l.*, conditioned for the payment of 1000*l.*, with statute interest for the same, as therein mentioned, and that it had been agreed, that, in consideration thereof, the plaintiff and *Isabella* his wife, should release unto the defendant, his heirs, executors, administrators, and assigns, all their interest, title, claim, and demand whatsoever, in and to the said sum of 750*l.*; and that the plaintiff should not receive interest for the said sum of 1000*l.*, during the life of the defendant, notwithstanding the said bond; and further, that if the said bond should happen to be assigned by the plaintiff, and the defendant should be obliged to pay the interest thereof, the plaintiff should repay or make good the same;—it was by the said deed poll witnessed, that in pursuance of the said agreement, and in consideration of the premises, and of the sum of ten shillings of lawful *British* money, to the plaintiff and *Isabella* his wife then paid by the defendant, the receipt whereof was thereby acknowledged, the plaintiff had remised, released, and for ever quitted claim, and by the said deed poll or writing did, for himself, his heirs, executors, administrators, and assigns, remise, release, and for ever quit claim unto the defendant, his heirs, executors, administrators, or assigns,

and did fully and absolutely exonerate and discharge him, them, and every of them, of, from, and against all that the said sum of 750*l.*, being the said *Isabella Morley's* moiety, share, or proportion of the said sum of 1,500*l.*, as aforesaid, and all the estate, right, title, interest, property, benefit, claim, and demand whatsoever, of them the plaintiff and *Isabella* his wife, and each of them, of, in, to, or out of the said sum of 750*l.* or the said sum of 1,500*l.*, and every or any part thereof, respectively, and also all that the covenant, promise, agreement, and obligation, in the said deed of settlement, or such other instrument as aforesaid contained or expressed for payment of the said sum of 1,500*l.*, and all benefit and advantage to be had or taken, of, from, or by means of the said deed or instrument, or of any covenant, claim, matter, or thing therein contained, and also, of, from, and against, all and all manner of action and actions, suit and suits, cause and causes of action and suit, liabilities, sum and sums of money, claims and demands whatsoever, which the plaintiff and *Isabella* his wife, or either of them, their, or either of their heirs, executors, administrators, or assigns, could or might have, claim, or demand, or, if the said deed poll or writing had not been made, could or might have had, claimed, demanded, or been entitled, in, to, upon, from, or against the defendant, his heirs, executors, administrators, or assigns, in his, their, or any of their lands, tenements, goods, chattels, or effects, for or in respect of the said sums of 750*l.*, and 1,500*l.*, or either of them; or by reason or on account of the said deed or other instrument, or of the breach or non-performance thereof, or otherwise howsoever, in relation thereto, so, and in such manner, as that they, the plaintiff and *Isabella* his wife, their, and each of their heirs, executors, administrators, or assigns, and all other persons claiming, or to claim, from, through, under, or in trust for them, any, or either of them, should not, nor could nor might take, have, or receive any advantage, or other-

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wise avail himself or themselves of the same in any manner howsoever. And the plaintiff did thereby, for himself, his heirs, executors, and administrators, amongst other things, covenant, declare, and agree, with and to the defendant, his heirs, executors, administrators, and assigns, that the plaintiff, his heirs, executors, or administrators, should not require payment of the said sum of 1000*l.*, nor claim or demand any interest for the same during the life of the defendant; and, that in case the said bond should be assigned by him, the plaintiff, to any person or persons who should claim and demand, and receive of and from the defendant, interest for the said sum of 1000*l.*, he, the plaintiff, his heirs, executors, or administrators, should and would repay unto the defendant all such sum and sums of money as he should pay for such interest; and in case he, the defendant, should be required by any assignee or assignees of the said bond to repay the said principal sum of 1000*l.*, then, that he, the plaintiff, his heirs, executors, or administrators, should and would pay unto the defendant, statute interest for the same, during the term of his natural life, as by the said deed poll (reference being thereunto had) will (amongst other things) more fully appear. And this, he the defendant is ready to verify; wherefore &c., if &c.

To this plea, the plaintiff replied, that, after the making of the said writing obligatory in the said declaration mentioned, and after the making of the said deed poll, or writing of release, in the said plea mentioned, and before the commencement of this suit, to wit, on the 7th *November*, 1829, to wit, at &c., by a certain indenture, then and there made between the plaintiff of the one part, and one *Henry Fitzwilliam Baker*, of the other part; (one part of which said indenture, sealed with the seal of the plaintiff, the plaintiff brings into Court here, the date whereof is a certain day and year therein in that behalf mentioned, to wit, the day and year last aforesaid, after reciting as

therein is particularly recited, and in consideration of the sum of 1000*l.*, of lawful *British* money, before the execution of the said indenture lent and advanced to the plaintiff by the said *Henry Fitzwilliam Baker*, and then due and owing to him the said *Henry Fitzwilliam Baker*, the receipt whereof the plaintiff did, by the said indenture, acknowledge, and also in consideration of the sum of ten shillings, of like lawful money, to the plaintiff then paid by the said *Henry Fitzwilliam Baker*, the receipt whereof was thereby acknowledged, he, the plaintiff, did bargain, sell, assign, transfer, and set over unto the said *Henry Fitzwilliam Baker*, his executors, administrators and assigns, the said writing obligatory in the said declaration mentioned, and also the penal sum, and all benefit and advantage whatsoever to be had or derived therefrom, and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the plaintiff, in, to, or concerning the same:—to have and to hold the said writing obligatory, penal sum, and other the premises by the said indenture assigned or intended so to be, unto the said *Henry Fitzwilliam Baker*, his executors, administrators, and assigns, to and for his and their own proper use and benefit;—and for the better and more effectually enabling the said *Henry Fitzwilliam Baker*, his executors, administrators, and assigns, to enforce the payment of, and to receive the moneys due or to become due upon the said writing obligatory, he, the plaintiff, did, by the said indenture, make, depute, constitute, and appoint the said *Henry Fitzwilliam Baker*, his executors, administrators, and assigns, his true and lawful attorney and attorneys, irrevocable, for him the plaintiff, and in his name, and in the name or names of his executors or administrators, but for the sole and proper use and benefit of the said *Henry Fitzwilliam Baker*, his executors, administrators and assigns, to demand, sue for, recover, and receive, of and from the defendant, and all and every other the

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person and persons to whom it should and might belong to pay the same, all and every the sum and sums of money then, or at any time, and from time to time thereafter, to grow or become due, or be payable upon or by virtue of the said writing obligatory, and, on non-payment thereof, to use and take all such lawful and equitable ways and means for obtaining or recovering the same, as should be deemed necessary or expedient in that behalf; and, on payment thereof, to deliver up or cancel the said writing obligatory, and to give sufficient releases and discharges for the moneys due thereon; and one or more attorney or attorneys, under him the said *Henry Fitzwilliam Baker*, his executors, administrators, or assigns, for any of the purposes aforesaid, to nominate, substitute, or appoint, and from time to time to remove and displace, as he or they should think fit, he, the plaintiff, thereby transferring and giving unto the said *Henry Fitzwilliam Baker*, his executors, administrators, and assigns, his full power and authority in the premises, to every intent and purpose, and ratifying and confirming, and promising and agreeing to ratify and confirm, all and whatsoever he or they should lawfully do or cause to be done in or about the premises by virtue of the said indenture, as, by the said indenture (reference being thereunto had) will (amongst other things) more fully and at large appear. The plaintiff then averred that the writ in this suit was sued out, and that this action was brought and is prosecuted against the defendant in the name of him the plaintiff, for and on the behalf of the said *Henry Fitzwilliam Baker*, for the purpose of enabling him, the said *Henry Fitzwilliam Baker*, to receive the said debt in the said writing obligatory mentioned, according to the form and effect, true intent and meaning of the said indenture, and solely for the use, benefit, and advantage of the said *Henry Fitzwilliam Baker*, as assignee of the said writing obligatory in the said declaration mentioned, and

not for the benefit, advantage, use, or behoof of the plaintiff, to wit, at &c. And this the plaintiff is ready to verify, wherefore &c., if &c. To this replication, the defendant demurred generally, and the plaintiff joined in demurrer.

The cause now came on for argument.

Mr. Serjeant *Cross*, in support of the demurrer.—The replication is insufficient, and is no answer to the defendant's plea. The deed poll executed by the plaintiff is a defeasance of the defendant's bond, and an answer to the plaintiff's demand. Although, if a party to a bond or deed afterwards executes another conveyance which may operate as a defeasance, if it does not recite the bond or deed, but relates to other matters, it must be made the subject of a cross action; yet here, the bond and the deed poll were simultaneous and executed at the same time. Though, in *Clayton v. Kynaston* (a), it was held, that one deed ought not to be construed as a defeasance of another, without necessity; yet the Court agreed, that if *A.* be bound to *B.*, and then *B.*, reciting this bond, covenants to save him harmless, this is an absolute defeasance; and if it be to save him harmless on a contingency, it is a conditional defeasance, because it hath an express relation to the deed. In *Burgh v. Preston* (b), where a bond was conditioned that the obligor should indemnify the obligee from all sums the latter should pay or be liable to pay on the obligor's account; and, before the execution of the bond a memorandum was indorsed thereon, that the obligee "hath given an undertaking not to sue upon the bond until after the obligor's death;" it was held, that this memorandum was to be taken as part of the condition, and made the bond in effect payable only by the representatives of the obligor, after his death. So, here, as the bond was given up-

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(a) 2 Salk. 573; S. C. 1 Ld. Raym. 419.

(b) 8 Term Rep. 483.

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on condition that the plaintiff would not require payment during the life of the defendant, the action is premature. The distinction between a condition and a defeasance is properly taken by Lord Chief Baron *Comyn* (a), *viz.* that a defeasance is an instrument which defeats the force or operation of some other deed or estate;—and that which in the same deed is called a condition, in another deed is a defeasance. Here, as the bond and deed poll were reciprocal acts, and both in fact form part of one and the same transaction, the latter operates as a defeasance of the former, particularly, as they were made *in eodem modo*, and executed at the same time; the plaintiff, therefore, is bound by his deed, which is clearly an answer to an action on the bond, if he had sued in his own right. If, then, the plaintiff himself be precluded from bringing an action on the bond during the life-time of the defendant, so must the assignee, for the assignor could not transfer a larger right than he had, and all that passed to the assignee was the plaintiff's right, title, and interest in the bond; and if the plea be an answer to the plaintiff's right of action, it will be equally a bar to the right of the assignee to sue. Although it may be said, that the provision as to the assignment of the bond would be altogether nugatory, if it deprived the assignee of his right to sue in the name of the obligee, yet the intention of the parties must be looked at; which shews that the assignee, as well as the obligee, must postpone bringing any action on the bond until after the decease of the defendant. If, indeed, the deed poll had been destroyed or lost, so that the defendant could not avail himself of it, he might have been compelled to pay the sum secured by the bond; and the provision for the payment of interest by the plaintiff to the defendant in case he should be required by the assignee to pay the principal, can only apply to a demand which the defendant could not resist; but, as he has pleaded the deed poll, it is an answer to the

(a) Com. Dig. tit. "*Defeasance*," A.

present action, and is a good and substantive defence both at law and in equity.

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Mr. Serjeant *Wilde*, for the plaintiff, was stopped by the Court.

Lord Chief Justice TINDAL.—The question in this case is, whether the deed poll, set out in the defendant's plea, operates as a defeasance of the bond on which the plaintiff has declared, or as a release of this action. If it does not, the plaintiff is entitled to judgment. He has declared on a common money bond, conditioned for the payment of 1000*l.*, and dated on the 14th *November*, 1828. The defendant, in answer, sets up a deed poll, or release, of the same date, by which, after reciting, that, by virtue of a deed of settlement, made on the marriage of the plaintiff's then wife with her former husband, the plaintiff would become entitled in her right, on the decease of her father, the defendant, to the sum of 750*l.*, which, by the deed of settlement, the defendant had covenanted that his heirs or executors should pay after his decease; and that the defendant had become bound to the plaintiff by a bond conditioned for the payment of 1000*l.*, with interest; the plaintiff and his wife agreed to release all their interest and claim to the sum of 750*l.*, and covenanted that he the plaintiff would not require payment of the 1000*l.*, nor claim or demand any interest for the same during the life of the defendant; and that in case the bond should be assigned by the plaintiff to any person, and the defendant should be required by the assignee to pay the principal sum of 1000*l.*, the plaintiff would pay the defendant interest for the same during his life. We are now called upon to say, whether, on looking at the legal operation of the deed poll, and the apparent intention of the parties, that instrument is to operate as a defeasance of the bond. There is a marked distinction between two parts of the deed poll, which it is impossible to overlook. The one consisting of

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a release of a deed, by which the defendant covenanted to pay 750*l.* after his death, and the other a covenant by the plaintiff not to sue or require payment of the 1000*l.* secured by the substituted bond during the life of the defendant. There are, undoubtedly, many cases in which a covenant not to sue may, if such be the intention of the parties, operate as a release, as in *Lacy v. Kynaston*, where Lord Chief Justice *Holt*, in delivering the judgment of the Court, said (a): “It was objected, that a perpetual covenant never to take advantage of a covenant, &c. is a release. The Court agreed to it for avoiding circuity of action:—as, if *A.* be bound to *B.* in a bond &c., *B.* covenants never to sue *A.* upon this bond; this will be a bar in debt brought upon the bond, because *B.* has bound himself against all the remedy that he might have upon the bond. But if *A.* and *B.* be jointly and severally bound to *C.*, and *C.* covenants never to sue *A.*, this is no defeasance, because he has a remedy against *B.*, but *A.* will have only covenant, &c.” Now, it is necessary, in this case, to look at the relative situations of the parties at the time the deed poll was executed, in order to ascertain whether it was their intention that it should operate as a defeasance, or as a release. It certainly operates as a release of the plaintiff’s claim on the defendant for 750*l.*, being the portion the plaintiff was entitled to receive in right of his wife, after the defendant’s death; but the bond for 1000*l.* was given in lieu of that sum; and, by the deed poll, the plaintiff merely covenants that he should not require payment of that sum, nor claim any interest for the same during the life of the defendant, and that in case the plaintiff should assign the bond to any person, and the defendant should be required by the assignee to pay the principal, then, that the plaintiff would pay the defendant interest for the same during the term of his life. The plaintiff,

(a) 1 *Ld. Raym.* 690; *S. C.* 2 *Salk* 575.

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therefore, only covenanted that he himself would not require or demand payment of the principal or interest during the life of the defendant, but the introduction of that exception or proviso, that in case the plaintiff should assign the bond, and the defendant should be required by the assignee to pay the principal, shews that the parties contemplated that the plaintiff might raise money on the bond, and assign it to another, who might sue the defendant for the principal, and, in case of his recovering, the plaintiff was to pay the interest on the sum recovered during the life of the defendant. The parties meant that the plaintiff should stand in the same situation as he did before the bond was executed; and if it had not been given, the plaintiff might have assigned his interest in the sum of 750*l.*, which he would be entitled to receive on the death of the defendant. If, indeed, the defendant had reason to suppose that the assignment of the bond was fraudulent, or that the action was brought to enable the plaintiff to recover for himself, he might have pleaded the fraud; but, for the above reasons, I think the plaintiff on the record as it now stands, is entitled to judgment.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—In *Solly v. Forbes* (a), it was held that a deed of release must be construed according to the particular purpose and intent for which it was made; and here it appears to me that the intention was, that if the plaintiff wished to raise money on the bond, he might assign it to the person who made the advance, and, if the assignee recovered the principal or any part thereof, the plaintiff was to pay the defendant interest on the sum recovered during his life.

Mr. Justice BOSANQUET.—I entirely concur with the

(a) 4 B. Moore, 448.

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rest of the Court, and think that the present action is maintainable according to the intention of the parties as manifested on the face of the deed poll, by which the plaintiff insured to himself a right to assign the bond, in case he should find it necessary so to do.

Judgment for the plaintiff.

Mr. Serjeant Cross then requested permission to rejoin fraud, according to the suggestion of the Lord Chief Justice. But the Court refused it.

Friday,
May 14th.

TAYLOR and KNIGHT, Assignees of MELLERS, an Insolvent Debtor v. LANYON.

The statute 8 Anne, c. 14, s. 1, which entitles a landlord to a year's rent on an execution sued out against his tenant, applies only to cases where the judgment creditor claims adversely to the landlord, and not where the execution issued out at the instance of the landlord himself. Therefore, where a creditor signed judgment on a warrant of attorney, and levied under a *fi. fa.* for the

THIS was an action of *indebitatus assumpsit*. The declaration contained counts for money had and received by the defendant to the use of the insolvent, money lent and advanced, and paid, laid out, and expended by the insolvent for the use of the defendant, and upon an account stated between the defendant and the insolvent:—also, counts for money had and received by the defendant to the use of the plaintiffs as assignees of the insolvent, and upon an account stated between the defendant and the plaintiffs as assignees as aforesaid. The defendant pleaded the general issue.

At the trial of the cause, before Lord Chief Justice Tindal, at Guildhall, at the sittings after the last Easter Term, the Jury found a verdict for the plaintiffs, damages

amount, after the tenant had become insolvent and surrendered himself to prison, where he remained until he was discharged by the Insolvent Debtors' Court:—*Held*, that the landlord could not retain a year's rent which was paid over to him by the sheriff's officer from the proceeds of the sale, and that the assignees of the insolvent were entitled to recover it back in an action for money had and received.

130*l.*, subject to the opinion of the Court upon the following case.

The insolvent, before and at the time of the issuing of the writ of execution hereinafter mentioned, was possessed of a certain house in *Norfolk-street, Strand*, in the county of *Middlesex*, as tenant thereof to the defendant, under a lease for a term of years then unexpired, and also of certain goods and chattels, being the furniture in the said house. On the 31st *May*, 1828, the insolvent being indebted to the defendant in the sum of 30*l.* for fixtures on the same premises, and in the sum of 50*l.* for part of the consideration for the lease of the said house, executed a warrant of attorney giving authority to enter up judgment at the suit of the defendant, for the said respective sums of 30*l.* and 50*l.* Final judgment was signed thereon on the 30th *June*, 1828, and a writ of *fieri facias* upon the said judgment, at the suit of the defendant, was issued on the same day against the goods and chattels of the insolvent. On the said 30th *June*, 1828, there was one year's rent due from the insolvent to the defendant under the said lease, and the defendant gave notice of the same being so due to the Sheriff's officer to whom the said writ of execution was delivered, and at the same time required him to retain the same out of the proceeds of the said execution, to satisfy the defendant for the said rent. On the 1st *July*, 1828, the said lease and goods and chattels of the insolvent were taken in execution under the said writ; and, on the 18th day of the same month, were sold under and by virtue of such execution, and produced 217*l.* 13*s.* 6*d.* The sum of 130*l.* for the said rent due to the defendant was deducted from the said sum of 217*l.* 13*s.* 6*d.*, the proceeds of the said sale, and on the 7th *August* paid over to the defendant by the said officer; and the balance, after further deducting the several sums due for taxing and incidental expenses, was paid into Court in this action. On the 14th *June*, 1828, the insolvent surrender-

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ed himself to prison in discharge of his bail, and continued in prison from that time until his discharge hereinafter mentioned. On the 19th *July* he filed his petition in the Court for the relief of insolvent debtors under and in pursuance of the act 7 *Geo.* 4, intituled an act to amend and consolidate the laws for the relief of insolvent debtors in *England*; and, on the 24th *September*, 1828, the insolvent was, under and in pursuance of the said act, discharged from imprisonment. The plaintiffs were the assignees of the estate and effects of the insolvent, and duly appointed and constituted according to the said act. The Jury found that the said warrant of attorney was not given by way of fraudulent preference to the defendant; and a verdict was accordingly entered for the plaintiffs.

The question for the opinion of the Court was, whether the plaintiffs, as assignees of the insolvent, were entitled to recover from the defendant the said sum of 130*l.*, so paid to the defendant? If the Court should be of opinion that the plaintiffs were entitled to recover, the verdict for them was to stand, if not, a nonsuit was to be entered.

The case now came on for argument.

Mr. Serjeant *Taddy*, for the plaintiffs.—The defendant is not entitled to retain the sum of 130*l.*, being the amount of rent due to him from the insolvent, and deducted from the proceeds of the sale under the execution. The main object of the Legislature in passing the Insolvent Debtors' acts, as well as the bankrupt acts, was to effect an equal distribution of the debtor's property and effects among his creditors. Here, the question arises on the construction to be put on the 34th section of the statute 7 *Geo.* 4, c. 57 (a), by which a warrant of attorney is not to

(a) By which it is enacted, that in all cases where any prisoner, who shall petition the Insolvent Debtors' Court for relief under that act, shall have executed any

warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the

be acted upon, against the goods of an insolvent, after his imprisonment; therefore, as far as regards the warrant of attorney in this case, the defendant was bound to refund the proceeds of the execution to the assignees of the insolvent, for the benefit of his creditors. The bankrupt act, 6 Geo. 4, c. 16, s. 108, contains a proviso, corresponding in terms with the above clause, *viz.* "that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors;" and in *Notley v. Buck* (a), where a creditor obtained judgment by *nil dicit* against a trader, and thereupon issued a *fiery facias*, under which the Sheriff seized the goods of the trader, who afterwards, and before the goods were sold, committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the Sheriff had notice, but, nevertheless, sold the goods, and paid over the proceeds to the execution creditor:—The Court (after taking time to consider) held, that the Sheriff was not justified in paying over the money, but was liable to be sued for it by the assignees, in an action for money had and received. No preference, therefore, can be shewn to a particular creditor, and in neither of the statutes is any exception or reservation made in favour of a landlord. The defendant might have exercised his right of distress; but it must be

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commencement of the imprisonment of such prisoner, avail himself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property thereto-

fore seized, or any part thereof; but that any person or persons, to whom any sum or sums of money shall be due in respect of any such warrant of attorney, or *cognovit actionem*, shall and may be a creditor or creditors for the same under that act."

(a) 8 Barn. & Cress. 160; S. C. 2 Man. & Ryl. 68.

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recollected that he was the execution creditor, and that the sum paid to him for the rent was deducted from the proceeds of the sale under the execution. The Legislature, in passing the statute 8 *Anne*, c. 14, contemplated the adverse rights of an execution creditor and a landlord, as the first section enacts "that no goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, leased for lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party at whose suit the execution is sued out, shall, before the removal of such goods from off the premises, by virtue of such execution, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises, at the time of the taking of such goods or chattels by virtue of such execution: provided the said arrears of rent do not amount to more than one year's rent." The object of that statute was to protect landlords against frauds committed by their tenants, and it was never meant to apply to a case where the same person is both execution creditor and landlord; and if he were to be permitted to levy for rent in the latter character, under an execution for a debt of a different nature, the tenant would be deprived of his right to contest the amount of the rent claimed in an action of replevin, and divested of the protection afforded him in case of an irregularity in the distress. Besides, if a party sue out an execution as a creditor, which it turns out he could not support, he might afterwards claim in his character of landlord for rent, which would not only be inconvenient, but would defeat the object of the statute 7 *Geo.* 4; for if the execution cannot be supported by a creditor, he cannot afterwards turn round and claim in his character of landlord. In *Lee v. Lopes* (a), it was determined, that if the Sheriff seize under an execution after an

(a) 15 East, 230.

act of bankruptcy, he is not entitled to retain for a year's rent; and having paid a year's rent to the landlord, he was required to shew that such payment was made without notice of the commission; and Lord *Ellenborough* said (a), "that a commission of bankrupt had been sometimes called a statutable execution; but, though it might be said to be similitudinary to an execution, it was not an execution within the meaning of the statute of *Anne*." That case is expressly in point; and, in *Brandling v. Barrington* (b), which was an action charging the defendant as Sheriff of the county palatine of *Durham*, for having removed the goods of a tenant from premises in his occupation, without having paid the landlord half a year's rent then due; the goods having been seized by virtue of a writ of *pone per vadios*, Lord *Tenterden* said—"The statute 8 *Anne*, c. 14, speaks only of goods taken by virtue of any execution, and the plain sense of the words is confined to executions on judgments. The process under which the Sheriff seized and sold the goods in question was not process of execution on a judgment; it was not, therefore, within the words of the statute. But it is said that it was within the equity (c). Speaking for myself alone, I cannot forbear observing, that I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases had their attention been directed to them (d)." But here, as the defendant proceeded as a creditor, and sued out execution as such in the first instance, he cannot afterwards claim in his char-

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(a) 15 East, 231.

(b) 6 Barn. & Cress. 467.

(c) See *Ex parte Plummer*, 1 Atk. 104.

(d) But see the statute 11 Geo. 4 and 1 Wm. 4, c. 11, by which

the provisions of the statute 8 *Anne* are extended to the writ of *pone per vadios* issued from the Court of the county palatine of *Durham*.

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acter of landlord; and the case of *Notley v. Buck* is decisive, to shew, that he is not entitled to retain the amount of the rent against the plaintiffs, as the assignees of the insolvent, and they are, therefore, entitled to retain their verdict.

Mr. Serjeant *Wilde, contra*.—This being an action for money had and received, it is incumbent on the plaintiffs to shew that they are entitled to recover according to equity and good conscience; but the defendant is legally entitled to retain the sum due to him for rent, and which has been paid to him under the execution. The 34th section of the statute 7 Geo. 4, c. 57, does not avoid the execution, or render it illegal:—it was properly sued out in the first instance, and duly prosecuted to a certain extent. It is, therefore, not like the case of a sale under an execution after an act of bankruptcy. The facts in the case of *Morland v. Pellatt* (a) bear a nearer resemblance to the present than in *Notley v. Buck*, which was referred to, and distinguished from that before the Court. In *Morland v. Pellatt*, judgment was entered up on a warrant of attorney given by two joint traders, and a *fiery facias* issued, returnable on the 2nd May; on the 1st of that month, the Sheriff's officer received from the defendants the money directed to be levied; on the 2nd, one of them committed an act of bankruptcy, and the other on the 5th; on the 11th, a commission of bankrupt issued, and, on the 19th, the Sheriff paid over the money to the execution creditor. In an action by the assignees for money had and received, it was held, that the execution creditor was entitled to retain it, he not being a creditor having a security at the time of the bankruptcy. If, therefore, an execution be completed, or the Sheriff has the money in his hands previously to an act of bankruptcy, it is his duty to pay it over to the execution creditor. Here, the acts done

(a) 8 Barn. & Cress. 722.

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by the Sheriff were legal, and the money levied became the property of the defendant on the 18th *July*, when the goods of the insolvent were sold under the execution, and he did not file his petition in the Insolvent Debtors' Court until the 19th, previously to which day the plaintiffs could have no title whatever, as they could only take by virtue of the assignment to them. In *Taylor v. Taylor* (a), the Court refused to set aside an execution issued upon a judgment obtained by *nil dicit*, and served and levied by seizure upon the property of a bankrupt before his bankruptcy; for, as Mr. Justice *Holroyd* said—"the statute 6 *Geo.* 4, does not say that the execution shall be void, or that the creditor shall not avail himself of it; but merely, that he shall not avail himself of it to the prejudice of other fair creditors, but shall be paid rateably with them." There is a wide distinction between the case of a bankrupt and an insolvent debtor, as the assignees of the former take by relation from the time of the act of bankruptcy, whilst the rights of the latter can only attach by the deed of assignment and conveyance, as regulated by the provisions of the statute 7 *Geo.* 4; and here, when the Sheriff executed the writ, he could not have known that the party was insolvent, or that he was about to present a petition to the Insolvent Debtors' Court. Although the defendant might have distrained for the rent due, he was not bound to resort to so dilatory a process, when he had a right to recover the fruits of his judgment by a summary proceeding; and, although the characters of landlord and execution creditor were united in him, he had a right to make his election, and the Sheriff, having levied, was bound to pay him the year's rent then due, according to the provisions of the statute of *Anne*. In *Lee v. Lopes*, the Sheriff was a wrong doer, as the goods seized were not the property of the debtor, but of the assignees, he having previously committed an act of bankruptcy; and the landlord had a right to distrain for the rent in arrear not-

(a) 5 Barn. & Cress. 392; S. C. 8 Dowl. & Ryl. 159.

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withstanding the bankruptcy. Although it is said, that it is the object of the statutes relating to bankrupts and insolvent debtors, to procure a fair distribution of their property among their creditors, yet it was never intended to deprive landlords of their priority; and the statute of *Anne* expressly enacts, that they shall be paid a year's rent, provided no more be in arrear, before the execution creditor can remove any of the goods from the premises. Besides, that is a remedial act, and the Courts have invariably given it its fullest effect in favour of the landlord's claim. In *Gore v. Goflon* (a), the Court directed the Sheriff, on an execution, to pay the landlord a year's rent without any deduction for poundage. In *Darling v. Hill* (b), where the landlord gave notice to the Sheriff in possession under a *fi. fa.*, that a year's rent was due, and he afterwards removed the goods and sold them, the Court ordered him to pay over such rent to the landlord. In *Henchett v. Kimpson*, Lord Chief Justice *Pratt* said (c)—“ Before the statute of *Anne*, executions took place of all debts that were not *specific liens*, even of rents due to landlords; it was thought hard that landlords should not have something like a *specific lien*; so the Parliament have given them this remedy for one year's rent but for no more, because, *vigilantibus et non dormientibus jura subveniunt*. Neither a plaintiff or defendant has any right to go upon the premises; the law gives this entry to the Sheriff only by virtue of the execution; but, after he has notice of rent being due to the landlord, he cannot remove the goods before he has satisfied the landlord one year's rent; the landlord shall have the like benefit of distress for one year's rent as if there had been no execution at all; unless the rent be paid, the Sheriff must quit, and if he does not quit, a special action on the case lies against him, after notice of the rent due; but there is a shorter way, by motion to the Court, that the landlord may have restitution to the

(a) 1 Str. 643.

(b) Cas. Temp. Hardw. 255.

(c) 2 Wils. 141.

amount of the goods the Sheriff has sold." In *Colyer v. Speer* (a), which was an action against the Sheriff for removing goods under an execution, without satisfying the landlord's claim for a year's rent, Mr. Justice *Burrough* said—"A Sheriff is required to levy first for the rent, and then for the execution. He cannot satisfy the creditor in the first instance, as the landlord has a security on the whole of the premises; and it would be an act of great injustice to him, if his rent were not first satisfied, as it was due at all events, and previously to the execution; and Mr. Justice *Richardson* said—"No specific form of notice of rent being due is required, as it is only given for the purpose of establishing the Sheriff's knowledge of the landlord's claim. A landlord is not bound to watch a Sheriff's officer, to see whether any property will remain after the execution creditor is satisfied. Besides, he could not interfere while the officer continued in possession; and it appears perfectly clear, from the terms of the statute, that the Sheriff or his officer is required, in the first instance, to raise a sufficient sum to pay the landlord his rent, and then, to satisfy the claim of the party at whose instance the execution is sued out."

But this being an action for money had and received, the plaintiffs are not entitled to recover; for, at the time of the levy, which is in the nature of a statutable distress, the goods were the property of the insolvent. The sale took place under the authority of the law, and the right and property in the lease and goods vested in the purchasers, and nothing afterwards passed to the plaintiffs as assignees under the deed of assignment, as the defendant had a right to retain a year's rent from the proceeds of the sale, under the execution which was levied at his instance, and for a debt *bona fide* due and owing. In *Moore v. Pyrke* (b), it was held, that an under-tenant, whose goods were distrained

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(a) 4 B. Moore, 473; S. C. 2 Brod. & Bing. 67. (b) 11 East, 52.

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and sold by the original landlord for rent due from his immediate tenant, could not maintain an action for money paid to the use of the latter, for that, immediately on the sale under the distress, the money paid by the purchaser vested in the landlord, in satisfaction of the rent; and Lord *Ellenborough* said—"Does the money produced by the sale vest, in the first instance, in the landlord, or in the tenant? On the best consideration I can give it, I think the money does not vest in the tenant, but is an instantaneous executed satisfaction of the rent, vesting to that amount in the landlord, and that the tenant has only an interest in the surplus, if any." And Mr. Justice *Le Blanc* said—"The property of the plaintiff distrained was in *goods*, and when they were converted into money by the sale under the distress, the money paid by the purchasers became immediately the property of the landlord who distrained for the rent, and not of the tenant." So here, at the time of the levy, the goods were the property of the insolvent; but, when they were sold, the money paid by the purchasers became immediately the property of the execution creditor, and did not pass to the assignees of the insolvent. In *Ex parte Plummer* (a), the question was, whether, after a commission of bankrupt taken out, and the messenger in possession, the landlord could distrain goods upon the premises for rent, or whether he should come in *pro rata* with the rest of the creditors under the commission; and Lord *Hardwicke* said—"I am of opinion that the landlord is entitled to distrain the goods remaining on the premises for his whole rent, notwithstanding the commission of bankruptcy, and the proceedings thereon;" and the cases of *Ex parte Jacques* and *Ex parte Dillon* were there cited, to shew, that where a landlord distrains after the messenger or assignees are in possession, he is entitled to have the goods restored or re-delivered to him. In

(a) 1 Atk. 103.

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Dixon v. Smith (a), it was held, that the landlord is entitled to be paid arrears of rent under a sequestration, in order to give effect to the equity of the statute of *Anne*. In *Straton v. Rastall* (b) Mr. Justice *Buller* said—“In order to recover money in an action for money had and received, the party must shew that he has equity and conscience on his side; and that he could recover it in a Court of equity.” And *Brisbane v. Dacres* (c) established the principle, that if a person with knowledge of the facts, but under a mistake as to the law, pays over to another, claiming it as a right, money which he was not compellable to pay, he cannot, upon discovering what his legal right was, recover it back, there being nothing against conscience in the other party's retaining it; and, *in pari delicto, potior est conditio possidentis*. But the case of *Buckley v. Taylor* (d) goes far beyond the present, where it was decided, that where goods were sold by the assignees of a bankrupt under the commission, and the landlord purchased them, he might retain out of the purchase money to the amount of a half-year's rent that was due; and Mr. Justice *Grose* said—“When the rent became due, the landlord's right of distress was well founded; and, if so, he is justified in retaining the money.” Here, as neither the defendant nor the Sheriff were wrong doers, and the former received the proceeds of the sale under the execution, he is, at all events, entitled to retain the amount of the rent due to him from the insolvent, both in equity and conscience; and the Court will give effect to the statute of *Anne*, which, being a remedial act, has always received a large and liberal construction.

Mr. Serjeant *Taddy* in reply.—The plaintiffs do not contend that the defendant is a wrong doer, as they have waived the *tort*, if any existed, by bringing an action for

(a) 1 Swanst. 457.

(c) 5 Taunt. 143.

(b) 2 Term Rep. 370.

(d) 2 Term Rep. 600.

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money had and received, which is the proper form of action. In *Taylor v. Taylor*, Mr. Justice *Holroyd* said (a)—“If the true construction of the act be that contended for on the part of the assignee of the bankrupt, he is not without a remedy, he may bring an action of trover against the Sheriff if the goods be removed, or he may petition the Chancellor; but in *Notley v. Buck*, Lord *Tenterden*, in delivering the judgment of the Court, said (b)—“The seizure, being prior to the act of bankruptcy, will be lawful and right; it is not necessary to say whether the sale be lawful or tortious; the sale may be a lawful act, and yet the proceeds may belong to the assignees; or, if it be wrongful, they may waive the wrong, and sue for the proceeds as money received to their use.” The main question then is, whether a landlord, who is also an execution creditor, after he has made his election, and sued out execution against his debtor, who has become insolvent, without exercising his right as landlord by distraining for the rent in arrear, can, after a sale by the Sheriff, retain such rent out of the proceeds of the sale? It is quite clear that he cannot, but that the assignees of the insolvent are entitled to it under the statute 7 *Geo.* 4. No third person intervened as an execution creditor; the suing out the execution was the defendant's own act, and the statute takes effect from the time the debtor goes to prison; and whatever property he was then possessed of, passed to his assignees, to be distributed rateably amongst his creditors. The statute of *Anne* only contemplated adverse rights, and, consequently, can only apply to executions sued out by third persons, and not by the landlord himself; and if it were allowed, it would not only give him an undue advantage, but would also deprive the tenant of his legal rights. The principle established in *Lee v. Lopes* must govern the present case; and Lord *Ellenborough* there said,

(a) 5 Barn. & Ald. 394. (b) 8 Barn. & Cress. 165; 2 Man. & Ryl. 68.

in the course of the argument—"The Sheriff has taken in execution the goods of the assignees, instead of the goods of the tenant. How then can he have a right to retain out of that fund which he had no right to take; or how can the landlord claim his rent out of the hands of a wrong doer?" There, as the Sheriff seized after an act of bankruptcy, and sold the goods after the commission issued, and afterwards paid the landlord a year's rent, it was held that such payment could not be justified, and that the assignees had a right to recover it back. In *Brandling v. Barrington*, Lord Tenterden objected to giving effect to the equity of the statute of *Anne*, and distinguished the cases that had been decided in a Court of equity, as there the applications were to the favour of the Court, and there was no complaint against the Sheriff, or the party to whom he had paid over the money. As, therefore, the defendant did not resort to his remedy by distress in the first instance, but waived his character of landlord, and adopted that of an execution creditor, he must come in rateably with the other creditors of the insolvent, and the plaintiffs are, consequently, entitled to judgment.

Lord Chief Justice TINDAL.—The main question in this case is, whether the right of the landlord to obtain his rent in the mode he has adopted, is protected by the statute of *Anne*? If not, the money paid to the defendant by the Sheriff's officer, although apparently received by him under the colour of the law for rent in arrear, was received by him without authority, and was, consequently, received to the use of the plaintiffs as the assignees of *Mellers*, the insolvent, as it was not paid over to the defendant until the 7th of *August*, 1828. On the best consideration I have been able to give the question, I am of opinion that the defendant's case does not fall within the operation or meaning of the statute of *Anne*,

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which was passed for the better security of rents, and to prevent frauds committed by tenants. The object of the statute therefore was to secure landlords against frauds which might be committed by their tenants, and particularly by those colluding with creditors to issue writs of execution on goods found on the premises of the debtor, whereby the landlord would be deprived of his right to distrain; for it is a well-known and recognised principle, that property *in custodia legis* cannot be made the subject of a distress. Now, a judgment creditor in collusion with his debtor, by keeping his property for a long period, might seriously affect the rights and interests of the landlord. The execution intended by the statute is not an execution put in at the instance of the landlord, but by a third person who claims adversely to the rights of the landlord. The words are, “that, from and after the 1st *May*, 1710, no goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless *the party at whose suit* the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution, *pay to the landlord* of the premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises, at the time of the taking such goods or chattels by virtue of such execution:—provided the said arrears of rent do not amount to more than one year’s rent.” Now, it appears to me to be quite clear, that the Legislature by these words contemplated an adverse execution, *viz.* where a *jus tertii* intervened, against which the landlord was meant to be protected. A claim made by a judgment creditor, and by a party entitled to rent, must be considered as distinct and separate claims, and made adversely to each other; for it would produce great disadvantage to the tenant if it were

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otherwise, because a Sheriff is required to levy first for the rent, and then for the execution. So a landlord, upon suing out execution for a trifling debt, might claim rent beyond what was actually due, whereas, if he had distrained for the rent, the tenant would have a right to replevy. But if we were to put the construction on this statute which the defendant contends it ought to receive, the tenant would not only be deprived of his right to replevy, but of the benefit of those statutes which allow him five days before the goods can be sold, and give him the advantage of availing himself of any irregularity by the party making the distress. But under an execution, as in this case, the Sheriff, as soon as he obtained possession, might sell at once and without notice or appraisement. It therefore seems to me, that a judgment creditor, after he has sued out execution against his debtor, cannot retain a sum paid to him for rent by the Sheriff's officer from the proceeds of the sale, and which he claims in his character of landlord, as he is not protected as such, within the meaning of the statute of *Anne*, and consequently, that the sum sought to be retained by the defendant in this case having been received by him to the use of the assignees of the insolvent, the plaintiffs as such assignees are entitled to retain their verdict.

Mr. Justice PARK.—I felt some difficulty at the latter part of my brother *Wilde's* argument, as to whether the action, being for money had and received, was the proper form of action. Upon that point, however, it is unnecessary for me to express an opinion, as I am quite clear that the defendant's case does not fall within the meaning or provisions of the statute of *Anne*. That statute contemplates two distinct parties claiming in adverse rights, and cannot apply to the case of a landlord, who is also the judgment creditor, and who has sued out execution as such. The statute supposes that

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the writ of execution has been sued out, before the landlord steps in and claims his rent. He cannot act in two characters at once; and as the defendant caused execution to be sued out against his debtor, who was also his tenant, he cannot deprive the latter of the benefit or advantage which the law gives him as such tenant. He had a right to replevy, or he might dispute his landlord's title; and although he might not deny his claim for rent, yet he might have demanded more than was due. The defendant by his own act is prevented from availing himself of the statute of *Anne*. He therefore cannot retain from the plaintiffs, as assignees of the insolvent, the sum which he has received from the proceeds of the sale of his effects.

Mr. Justice GASELER.—For the reasons stated by my Lord Chief Justice, and my brother *Park*, I am of opinion, that the defendant, claiming to retain a sum due to him for rent, as landlord of premises held by his debtor, is not within the meaning of the statute of *Anne*. When the Sheriff sold the goods on the 18th *July*, the money he received from the purchasers was received for the use of the insolvent; and although he did not file his petition until the 19th, yet his effects had previously become the property of the provisional assignee. When, therefore, the money was received by the Sheriff, he received it to the use of the plaintiffs as the ultimate assignees, who took the property of the insolvent, by relation, as if the assignment had been made to them in the first instance.

Mr. Justice BOSANQUET.—I am of the same opinion. It appears to me that the defendant's case does not fall within the meaning of the statute of *Anne*, which contemplated a case where the rights of a landlord might be defeated by the intervention of a judgment creditor, who had sued out a writ of execution against his debtor. The

words of the statute are, in effect, that the party, at whose suit the execution is sued out, shall, before the removal of the goods from off the premises, pay the landlord the rent due, provided it does not amount to more than a year's rent. It is obvious, therefore, that the rent is to be paid out of the money to be received by the party who has sued out execution; and the landlord must claim it in his character as such, and not as a party to the execution. Here, there being no adverse execution, the defendant, as landlord, might have distrained if he had thought fit, before he put the Sheriff in motion. But, it has been said, that he might levy under the execution, as much as he was entitled to distrain for rent, and that he has now a right to retain the sum he has received in satisfaction of such rent. But, if he were permitted to do so, it would deprive the tenant of the remedies and privileges the law allows him in case of a distress. It therefore appears to me, that the sum due for rent has been improperly paid over to the defendant, and that, according to the decision of the Court of *King's Bench*, in *Notley v. Buck*, the action for money had and received is the proper form of action.

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Postea to the plaintiffs.

MOSER and Another, Assignees of MARSHALL, a Bankrupt, v. NEWMAN and BOOLE.

Friday,
May, 14th.

THIS was an action of trover. Plea—the general issue. At the trial of the cause, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last *Trinity* Term, *vis.* on the 23rd *October* last, a verdict was found for the plaintiffs for 51*l.* 18*s.* 1*d.*, being the damages

An act of bankruptcy by lying in prison twenty-one days, under the statute 6 *Geo.* 4, c. 16, s. 5, does not relate to the first day of the imprisonment, as

such act is not complete until the twenty-one days have elapsed.

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agreed upon between the parties, subject to the opinion of the Court upon the following case:—

The plaintiffs were the assignees of the estate and effects of *R. H. Marshall*, a bankrupt, the assignment to them having been duly executed on the 28th *February*, 1828. The defendant *Newman* had been the Sheriff of the county of *Devon*, and the defendant *Boole* was an execution creditor of the bankrupt, under whose indemnity the Sheriff acted in the several matters hereunder stated. On the 12th *September*, 1827, the bankrupt executed a warrant of attorney to the defendant *Boole* for securing the payment of the sum of 500*l.* then advanced to the bankrupt. That warrant of attorney was duly filed, and judgment was entered up by *nil dicit* on the 16th *January*, 1828, on which day a writ of *fieri facias* was issued, directed to the Sheriff of *Devon*, indorsed to levy 512*l.* 18*s.* 1*d.*, returnable on *Wednesday* the 23rd *January* then next following. On *Friday*, the 18th *January*, the writ was delivered to the Sheriff, who thereupon seized the goods under the writ, which, before the bankruptcy, belonged to the bankrupt, and which then remained in his possession. The Sheriff afterwards, *vis.* on the 22nd *January*, commenced selling the goods so seized, and continued such sale up to and on the 25th day of the same month, when the last of such goods were sold. The proceeds of the sale remained in the hands of the Sheriff until the 28th *August* following, when they were paid over to the defendant *Boole*. The bankrupt was detained in prison in the custody of the defendant *Newman*, as Sheriff of *Devon*, for debt upon mesne process, on and from the 23rd *January*, 1828, for twenty-one days and upwards then next following. On the 14th *February*, 1828, a commission of bankrupt was duly issued against *Marshall*, and, on the 18th *February*, notice was given to the Sheriff that such commission had issued against the bankrupt, and that all his goods, money, and effects seized by the Sheriff, and

then in his hands, were claimed by the assignees under the said commission.

The questions for the opinion of the Court were—*First*, whether, under the fifth section of the statute 6 *Geo.* 4, c. 16, the act of bankruptcy, by lying in prison twenty-one days, had relation to the first day of such imprisonment? *Secondly*, whether, supposing such relation to have existed, an action of trover was maintainable in respect of goods seized by the Sheriff under the *fiери facias*, on a day prior to the first imprisonment? *Thirdly*, whether the sale before the act of bankruptcy was complete amounted to a conversion? And *fourthly*, whether the plaintiffs were entitled to recover the value of the goods so seized and sold by the Sheriff?

If the Court should be of opinion that the plaintiffs were entitled to the verdict, it was agreed upon by the parties that the same should be entered for the sum of 51*l.* 18*s.* 1*d.*

The case now came on for argument.

Mr. Serjeant *Wilde*, for the plaintiffs.—The first and main question is, whether, under the fifth section of the statute 6 *Geo.* 4, the act of bankruptcy by lying in prison twenty-one days, has relation to the first day of such imprisonment (*a*)? A similar clause was introduced in the old statutes. The 1st *James* 1, c. 15, s. 2, enacts, “That every person using the trade of merchandize &c., who, being arrested for debt, shall, after his arrest, lie in prison *six months* or more upon that arrest, shall be accounted and adjudged a bankrupt.” There are no words in that clause, to explain whether the act of bankruptcy by lying in prison has relation to the day of the arrest. Then came the statute 21 *Jac.* 1, c. 19, the second section of which enacts, “That every person using the trade of merchandize, who, being arrested for debt, shall, after his arrest, lie in

(*a*) See this section, *post*, pp. 338, 339.

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prison *two months* or more, upon that or any other arrest or detention in prison for debt;—or, being arrested for the sum of 100*l.*, or more, of just debt or debts, shall, at any time after such arrest, escape out of prison, or procure his enlargement by putting in common or hired bail, shall be accounted and adjudged a bankrupt; and in the said cases of arrest or lying in prison for such debt or debts, or getting forth by common or hired bail, *from the time of his first arrest.*” That statute, therefore, superadds express words of relation to the time of the arrest. If, therefore, a trader lay in prison six months, it was an act of bankruptcy by the statute 1 *Jac.* 1, and that period was afterwards reduced to two months, by the 21 *James* 1, and the statute 6 *Geo.* 4 makes a still further reduction to twenty-one days; and although some difficulty may arise from the obscure wording of the fifth clause, yet the act of bankruptcy has relation to the first day of the imprisonment, notwithstanding it is not so expressed. No decided cases are reported in the interval between the passing of the statutes 1 *Jac.* 1, and 21 *Jac.* 1; but, considering the preambles in the earlier statutes, in which bankrupts were described as persons craftily obtaining into their hands other men’s goods, and consuming the substance obtained by credit of others, against all reason, equity, and good conscience (a), and the statute 13 *Eliz.* c. 7, recited, that as those kind of persons had increased, it was found necessary to enact severe laws; and as the 1st and 21st *Jac.* 1 recite, that frauds and deceits were increasing more and more by such as wickedly became bankrupts;—it is probable the same construction would have been given to the former as to the latter statute, otherwise an opportunity would have been afforded to the bankrupt to dispose of all his property during his six months’ imprisonment. The decisions on this point, on the 21st *Jac.* 1, are conflicting. In *Duncombe v. Walter* (b),

(a) See the statute 34 & 35 *Hen.* 8, c. 4.

Leach, 265; S. C. 2 *Lev.* 57; Sir Tho. Raym. 479; 1 *Vent.* 370.

(b) 2 *Show.* 253, 2nd edit. by

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it was held, that an arrest made by an executor, before he obtains probate, is good as between the parties themselves, but not to affect the interests of third persons; and therefore, that if a trader be so arrested and give bail, and afterwards surrenders in their discharge, and lies in prison two months, it shall not be an act of bankruptcy from the first arrest, so as to avoid a payment made by the bankrupt to another creditor on the day that probate was granted; but that, if the arrest under such circumstances were legal, the act of bankruptcy should relate to the time of the surrender. But in *Hill v. Shish* (a), it was decided, that if a trader be arrested on several actions, and give bail, his not paying the debts in six months after such arrest and bail given, shall not make him a bankrupt until after the six months, for the statute 21 Jac. 1, c. 19, does not relate to the time of the arrest. Although, in a note to the case of *Duncombe v. Walter*, it is stated, that Lord Chief Justice Holt, in *Smith v. Stracy* (b), is made to say, that he was dissatisfied with the judgment in the former case, and that in *Hill v. Shish*, it was said, that the judgment was given on the ground of the arrest being illegal; yet the decision in *Duncombe v. Walter* has been since confirmed, and the distinction now is, that where bail is put in, and the party at a future day surrenders in their discharge, the time is computed not from the time of the first arrest, but from the time of the surrender:—but if the bail is a mere matter of form, and put in for the mere purpose of turning the party over from one custody to another, it is a continuation of the same imprisonment, and has relation to the first arrest. Although, in the late case of *Higgins v. M^r Adam* (c), the Court of *Exchequer* decided that an act of bankruptcy by lying in prison twenty-one days, under the 6 Geo. 4, c. 16, s. 5, does not relate to the time of the arrest; yet the object of the Legislature was

(a) 2 Show. 512.

(b) 1 Salk. 110.

(c) 3 Younge & Jervis, 1.

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to prevent a trader from disposing of his property during his imprisonment. The moment he is imprisoned, his trade is suspended, and public convenience requires that the act of bankruptcy shall have relation to the first day of the imprisonment; and though the statute does not so express it, there can be no doubt but that the framer of the act intended that it should so operate, particularly, as the main object of the act was to prevent frauds by debtors; and the 135th section expressly enacts, that the act shall be construed beneficially for creditors; and if the debtor may be allowed to part with his property for the period of twenty-one days before he commits an act of bankruptcy, it will wholly defeat the evident intention of the statute.

Mr. Serjeant *Taddy*, *contra*, was stopped by the Court.

Lord Chief Justice TINDAL.—It appears to me that the true construction to be put on the fifth section of the statute 6 Geo. 4, c. 16, is, that an act of bankruptcy by lying in prison twenty-one days, is not complete until the twenty-one days have elapsed from the time of the arrest or commitment to prison. Even if this were *res integra*, and there was no case to guide us, I should consider this to be the true and proper construction. The fifth section enacts that “if any such trader (that is, a trader liable by virtue of the act to become bankrupt), having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days, or, having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him and not discharged, every such trader shall be *thereby* deemed to have committed an act of bankruptcy.” The word ‘thereby’ is a most comprehensive word, and includes not only the day of the arrest or

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first imprisonment, but the twenty-one days during which the party has been detained in prison, and which must have elapsed before the act of bankruptcy is completed. There is a marked distinction in the language of the subsequent part of the same clause, which appears to me to remove all doubt, *viz.* "or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy, *from the time of such arrest, commitment, or detention.*" The framer of the act, therefore, has expressed a clear distinction between the two cases; as, by the former part of the clause, the act of bankruptcy is committed at the expiration of the twenty-one days; and, by the latter, at the time of the arrest. But the question does not rest here, and the distinction may be traced historically. In the statute 1 *Jac.* 1, c. 15, which first made a lying in prison for debt an act of bankruptcy, the relation of such act is altogether omitted, but it is inserted in the 21st *Jac.* 1, c. 19, as the second section of that statute superadds express words of relation to the different acts of bankruptcy therein enumerated, *viz.* in the case of a lying in prison for a debt of 100*l.* *from the time of the first arrest*:—a similar provision has been repeated in every statute from that period to the passing of the 5th *Geo.* 4, c. 98, where it was altogether omitted; and it appears to me, that the omission was intentional, as the period of imprisonment, to constitute an act of bankruptcy, was so much abridged. The case of *Hill v. Shish* is open to doubt, for the reporter (*Show*er) states (a), that Chief Justice *Wright*, and the rest of the Court, delivered their opinions for the defendant, without having that due consideration of the case as it deserved, as he thought; and he adds, "*Ideo mihi restat dubitandum.*" Besides, on looking at the statute 21 *Jac.* 1, a distinction may be drawn between an act of bankrupt-

(a) 2 *Show.* 525, 2nd ed. 507.

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cy, by not paying a debt within six months after an arrest, and an act by lying in prison two months, or escaping from prison after the arrest; for it is only in the cases of arrest or lying in prison for debt, or getting out by common or hired bail, that the relation to the time of the arrest is to apply.

Mr. Justice PARK.—I am of the same opinion. It is not necessary to discuss the question at large, which appears to me to be historically clear; for when we see that the Legislature have sometimes omitted the words of relation to an act of bankruptcy, and at other times inserted them, we must presume that their attention has been drawn to the point. Although the statute 5 *Geo.* 4, c. 98, only existed for one day, yet the words of relation were altogether omitted throughout; and when we see that in the 6 *Geo.* 4, the framer of the act has discriminated between the two cases to which the fifth section relates, and omitted the words of relation in the former part of the clause, and inserted them in the latter, it would be too much for me to say that the construction put upon the whole of the clause by my Lord Chief Justice is not the true construction. But the case of *Higgins v. M'Adam*, considering by and before whom it was argued, and that the Court took time to consider before they delivered their judgment, appears to me to remove all doubt, and to be conclusive of the question.

Mr. Justice BOSANQUET.—I am of the same opinion. The Courts are extremely cautious in the construction of a statute, to give it a retrospective effect by relation. The words of the act, as well as the intention, must be clear, in order to induce us to give the clause in question such an effect. But, on a review of the former statutes, when we see that words of relation have sometimes been introduced, and sometimes omitted, we must assume that such omission is intentional, particularly, as the period of

imprisonment, by which an act of bankruptcy may be constituted by lying in prison, is now limited to the short period of twenty-one days. My Brother *Gaselee*, having left Court for chambers at the close of the argument, has requested me to say that he concurs in this decision.

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Judgment of nonsuit.

KEY and Another, Assignees of SHERWIN, a Bankrupt,
 v. GOODWIN.

Tuesday,
 May 18th.

A COMMISSION of bankrupt was issued against *Sherwin*, on the 2nd *March*, 1822. On the 7th, one *William Button* deposed before the commissioners to an act of bankruptcy committed by *Sherwin*, in *May*, 1821, by a denial to a creditor. *Button* died a few days after he had made his deposition. No proceedings were taken under the commission from the time it was issued until the latter end of 1827. The above deposition, together with others, was enrolled on the 1st *March*, 1828, in the mode prescribed by the statute 5 *Geo.* 2, c. 30, s. 41, and also under the statute 6 *Geo.* 4, c. 16, s. 95.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last *Michaelmas* Term, on the deposition being offered in evidence by the plaintiffs in support of the commission, it was objected for the defendant, that it could not be received, as the statute 5 *Geo.* 2, had been repealed by the 6 *Geo.* 4, c. 16, previously to the enrolment, and that the latter statute applied only to commissions which had been sued out subsequently to the passing of that act.

A commission of bankrupt was sued out against a trader, in 1822, when a deposition was made before the commissioners, proving the act of bankruptcy. The deponent died shortly afterwards, and no proceedings were taken under the commission until 1827. The deposition was not enrolled until *March*, 1828, when it was enrolled in the mode prescribed by the 5 *Geo.* 2, c. 30, s. 41, and also under the 95th section of the statute 6 *Geo.* 4, c. 16:—*Held*, that the deposition was not admissible in evidence, the statute 5 *Geo.* 2 having been re-

pealed by the statute 6 *Geo.* 4; and that the 92nd section of that statute, which makes depositions conclusive evidence of the matters therein contained, is prospective, and applies only to commissions to be sued out after the passing of that act.

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The Lord Chief Justice considering the objection to be well founded, rejected the deposition; and as the plaintiffs had no other proof of an act of bankruptcy by *Sherwin*, the Jury returned a verdict for the defendant.

Mr. Serjeant *Taddy*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial had, on the ground that the deposition ought to have been received in evidence, either under the 92nd or 95th sections of the statute 6 *Geo.* 4, c. 16, as it had been enrolled according to the mode prescribed by the latter clause, and also according to the 41st section of the statute 5 *Geo.* 2, c. 30 (*a*).

(*a*) The 41st section of the statute 5 *Geo.* 2, c. 30, enacts, "That, upon the petition of any person to the Lord Chancellor, praying that commissions of bankrupts, and the depositions taken thereon, or any part of such depositions, &c. &c., may be entered of record, the Lord Chancellor shall and may direct and order such commissions, depositions, &c., &c., to be entered of record; and in case of the death of the witnesses proving such bankruptcy, or in case the said commissions, depositions, &c. &c., shall be lost or mislaid, a true copy of the record of such commissions, depositions, &c. &c. signed and attested as thereinafter mentioned, shall and may upon all occasions be given in evidence to prove such commissions, and the bankruptcy of such person against whom such commission hath been or shall be awarded; any law, usage, or custom, to the contrary, notwithstanding: and to

the end that any creditor or other person may know where to search and see whether such commission hath issued, and find what depositions, &c. &c. have been taken by virtue thereof, and what proceedings have been had thereupon, the Lord Chancellor shall appoint a certain proper place near the inns of Court, where all and every the matters aforesaid shall be entered of record, where all persons shall be at liberty to search and see if the same are duly entered of record; and the Lord Chancellor shall, by a writing under his hand, appoint a proper person, who shall, by himself, or his sufficient deputy, to be approved by the Lord Chancellor, by a writing under his hand, enter of record such commissions, depositions, &c. &c. and other matters and things, and have the custody of the entries thereof."

The 92nd section of the statute 6 *Geo.* 4, c. 16, (which is

Mr. Serjeant *Adams* now shewed cause.—The deposition was properly rejected as evidence for the assignees in support of the commission. The 95th section of the statute 6 Geo. 4, enacts, “that *all things done* pursuant to the 5 Geo. 2, are thereby repealed;” and from the passing of the 6 Geo. 4, authority is given to the Lord Chancellor to appoint a proper person to enter of record all matters relating to commissions of bankrupt, and who is to have the custody of the entries thereof. If, indeed, the deposition had been enrolled according to the 41st section of the statute 5 Geo. 2, before that act was repealed, and which might have been done, there can be no doubt but that it might have been received in evidence; and, although it was also enrolled under the 95th section of the 6 Geo. 4, yet it was

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a new clause), enacts, “That if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission), within two calendar months after the adjudication, or (if he was out of the United Kingdom,) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the Commissioners at the time of, or previous to the adjudication of the petitioning creditor’s debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law, or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit.”

The 95th section enacts, “That *all things done* pursuant to the act

passed in the fifth year of King George the Second, and hereby repealed, whereby it was enacted, that the Lord Chancellor should appoint a place where all matters relating to commissions of bankruptcy should be entered of record, and should appoint a person to have the custody thereof, be hereby confirmed; and the Lord Chancellor shall be at liberty from time to time, by writing under his hand, to appoint a proper person, who shall, by himself or his deputy (to be approved by the said Lord Chancellor), enter of record all matters relating to commissions, and have the custody of the entries thereof; and the person so to be appointed, and his deputy, shall continue in their respective offices so long as they shall respectively behave themselves well, and shall not be removed, except by order in writing under the hand of the Lord Chancellor, on sufficient cause therein specified.”

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not a thing done pursuant to the 5 *Geo.* 2. Besides, the 92nd section differs materially from a clause containing a similar provision in the statute 49 *Geo.* 3, c. 121, (s. 10), as there depositions taken under the commission were made evidence of the facts therein contained, unless notice were previously given of an intention to dispute them; whereas, by the late act, if no such notice be given, the facts of there being a sufficient petitioning creditor's debt, trading, and act of bankruptcy, are conclusive evidence of the matters therein contained. The 96th section of the 6 *Geo.* 4, only applies to commissions to be issued *after* the act shall have taken effect; and here, the commission was sued out in *March*, 1822, and the act did not come into operation till *September*, 1825. The deposition might have been enrolled before the death of the deponent, but the officer who entered it of record was appointed under the 6 *Geo.* 4, and no distinction is now made between the deposition of a dead or a living witness. The question then is, whether the 92nd section, which makes depositions conclusive evidence in actions by assignees for any debt of the bankrupt, unless he dispute the commission, can be so construed as to have a retrospective operation, and to extend to commissions sued out previously to the passing of the act. The case of *Key v. Cooke* (a), is expressly in point, and the Court there held that that section was prospective, and applied only to commissions issued after the passing of the 6 *Geo.* 4, and although Lord Chief Justice *Best* was of opinion at the trial, that the clause was retrospective, and allowed the deposition to be read; yet, after argument in *Banc*, his Lordship said, that he was convinced that he had formed an erroneous opinion, and that the section only applied to commissions to be issued after the passing of the act; and Mr. Justice *Burrough* said—"It appears to me to be quite

(a) 2 Moore & Payne, 720.

clear, that the 92nd section is prospective only; and although Mr. Justice *Gaselee* confined his opinion to the defective form of the deposition, yet he did not dissent from the Court; and though Mr. Justice *Park* appears to have been at chambers, it must be assumed that he concurred in that decision, as he had heard the greater part of the argument. If the Court were to give the clause a retrospective operation, it would have the effect of setting up invalid commissions sued out before the passing of the act. Besides, it would be a great hardship on the bankrupt, as it would preclude him his right of contesting the commission within the period which the Legislature intended to allow him. Again, the situation of the debtors of the bankrupt would be changed, by rendering them liable to repay to the assignees sums they might have paid to the bankrupt, which, if the commission were invalid, would be protected. The Court will look at the whole of the statute; and it is an established and recognized principle, that a clause is not to operate retrospectively, unless the Legislature have expressly declared that it should so operate; and as almost all the sections in the statute have a prospective view, and the Legislature, at the time it was passed, contemplated commissions to be issued, the 92nd section cannot be so construed as to operate on a commission previously sued out, particularly, as it would have the effect of setting up a bad or invalid commission, and give new rights to the assignees to the prejudice of the bankrupt, and the detriment of his debtors.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Andrews*, in support of the rule.—In order to put a true construction on any particular section of the statute, the whole of the act must be looked at; and in those clauses where the word commission is used generally, and without limitation, it was evidently the intention of the Legislature to embrace all commissions in existence at the time the act

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was passed ; and where the statute was meant to be limited to commissions sued out subsequently to the passing of the act, it is expressly provided for, as in the 96th section, which applies to commissions issued *after the act shall have taken effect*. Now, the language of the 92nd section is not confined to commissions to be sued out after the passing of the act, but, on the contrary, has a retrospective view, as it enacts, “ that if the bankrupt shall not, within a limited period, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions shall be conclusive evidence of the matters therein contained.” Although, in *Key v. Cooke*, Lord Chief Justice *Best*, and Mr. Justice *Burrough*, expressed an opinion that the 92nd section was not *retrospective*; yet, there is a fallacy in the use of that word, for the question is not whether that clause is to have a retrospective operation, but whether it applies to all commissions generally, or only to those of a particular class. Now, the word ‘ commission,’ standing by itself, embraces all commissions, as well those that have previously been issued, as those that are to be sued out after the passing of the act, or after it has come into operation. In *Bell v. Bilton* (a), the question was, whether the 54th and 55th sections of the statute 6 Geo. 4, as far as they regarded the proof of annuities, applied to commissions sued out before the passing of that act? The Court there took time to consider, and Lord Chief Justice *Best*, in delivering the judgment, said (b)—“ I confess I have had considerable difficulty in making up my mind as to whether or not the Legislature could mean to affect annuities granted before the passing of the late act; but although I cannot satisfy myself that the principle of the act is just, I think, on reflection, that the Legislature did intend that the clauses should apply to

(a) 1 Moore & Payne, 574; S. C. 4 Bing. 615.

(b) 1 Moore & Payne, 582.

annuities granted before the passing of the act; and, being satisfied of that, we are bound to give it this effect, whatever may be the consequence. Where the Legislature intended that the statute should not affect commissions previously issued, that intention is declared in express terms. Such terms will be found in the 57th, 96th, and 98th sections. The introduction of such words into those sections furnishes a strong argument to prove that the other sections, containing words capable of bearing a retrospective construction, should receive that construction."—That is the true principle, and consistent with the equitable construction of the statute; for, in the case of *Ex parte Grundy* in the matter of *Russell* (a), it was held, that the 56th section was retrospective in its operation; and that, although the event upon which a debt was contingent had happened after the commission issued, and before the 6 Geo. 4, c. 16, came into operation, the debt was proveable under the commission; and the Lord Chancellor (b) there said (c)—“Confining my attention, in the first place, to the words of the 56th section alone, they appear to me, in terms, to apply as completely to a contingency which happened before, as to a contingency occurring after the time when the act came into operation. Such is the construction which I should be disposed to put upon the 56th section, if it stood alone; but great light is thrown upon the intention of the Legislature, by reference to other clauses of the act. In that immediately following (the 57th), which enables the holder of any bill of exchange or promissory note to prove for interest, where interest is not reserved by the instrument, and it is over due at the issuing of the commission, the words are:—‘That in all *future* commissions against any person or persons liable upon any bill of exchange or promissory note, whereupon interest is not reserved, over

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(a) 1 Mont. & Macarth. 293.

(b) Lord Lyndhurst.

(c) 1 Mont. & Macarth. 310, *et seq.*

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due at the issuing the commission, the holder of such bill of exchange or promissory note shall be entitled to prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at such rate as is allowed by the Court of *King's Bench* in actions upon such bills or notes.' It is an argument, fairly deducible from this section, that, where the Legislature intended to confine the act to future commissions, the intention is expressed in direct terms. The same observation is applicable to the 96th and 98th clauses, the first of which commences with the words—' That, in all commissions issued *after* this act shall have taken effect,' &c.; and the second with the words—' That, *after* this act shall have come into effect,' &c. Under these circumstances, independently of what I consider to be the obvious and legitimate interpretation of the 56th section, considered by itself, I think the construction I have stated is confirmed by adverting to the language used by the Legislature in other clauses, where the operation of the enactment was intended to be confined to the future.

" But the 135th section has been cited as being at variance with this construction of the 56th section. The words relied upon were—' That nothing herein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared;' and the words which follow—' That nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or *affect* or *lessen* any *right*, claim, demand, or *remedy*, which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted;' and it was contended that the meaning of these words is, that the statute shall not be applied

to commissions which existed previously to its coming into operation, except where it is expressly declared that the act shall apply. But this argument is inconsistent with the mode adopted to confine the operation of the statute in the 57th, 96th, and 98th sections, and would, in my opinion, extend the effect of the clause beyond the natural and obvious import of the words used.

“It remains to be observed, that the case is not devoid of authority. A question, analogous to the present, and which depended upon the construction of the clause immediately preceding the 56th section, was determined by the Court of *Common Pleas*, in *Bell v. Bilton* (a). The Judges were, in that case, of opinion, that where the Legislature intended to confine the operation of the act to future commissions, that intention has been expressed. So far, therefore, as there is any analogy between the 55th and 56th sections, I consider the decision in *Bell v. Bilton* to be in point. There have also been decisions in this Court, which appear to have been grounded upon a similar construction of the statute.

“As to the consequences of the construction to which I have adverted, it was contended at the bar, that it may be productive of hardship in particular cases. It is certainly possible that it may; but in other cases, as in that before the Court, it will operate beneficially; and in the majority of instances that can be stated, I think it will prove advantageous to creditors, and give full effect to the remedy intended by the Legislature.”

In the late case of *Cuming v. Welsford* (b), the Court held, that an execution sued out upon a final judgment, after a judgment by *nil dicit*, came within the proviso of the 108th section of the statute; and that the words, obtained by default, confession, or *nil dicit*, applied to a judgment obtained before, as well as after the passing of

(a) 4 Bing, 615.

(b) *Ante*, 238.

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the act. Although, it has been said, that if the Court should hold the 92nd section to be retrospective, it will operate as a hardship on the bankrupt; yet the depositions are only to be conclusive evidence *of the matters therein contained*, and it must be assumed, that the bankrupt in this case was aware of their contents, and that he did not think it prudent or advisable to contest the commission. Besides, that section must be construed with reference to the 135th, which enacts, "That the act shall be construed beneficially for creditors, and that nothing therein contained shall render invalid any commission then subsisting, or which should be subsisting at the time the act should take effect;" and as the spirit of the act, coupled with the manifest intention of the Legislature, was, to establish peace between bankrupts and their creditors, and the bankrupt himself had not given notice of his intention to dispute the commission within two months after the adjudication, the depositions are conclusive evidence of the facts therein stated, and ought to have been received as such; and it never could have been intended that the assignees should be deprived of their just rights, or that a debtor of the bankrupt should be allowed to object to the giving the depositions in evidence, when the bankrupt himself had given no notice of his intention to dispute the commission. As, therefore, the deposition in question was enrolled according to the provisions of the 6 Geo. 4, it ought to have been admitted in evidence, for, in Mr. *Eden's* (now Lord *Henley*) Treatise on the Bankrupt Law it is said (a)—"The statute 5 Geo. 2, c. 30, s. 41, contained a provision for the enrolment of the commission and depositions, by which, upon the death of the witnesses, or loss of the proceedings, copies of the record of such matters were made evidence. This provision is continued by the new act (b)." The deposition was accordingly enrolled pursuant to the 95th section

(a) 2nd Edit. 353.

(b) Sections 95, 96.

of the statute, as well as under the above clause of the statute 5 Geo. 2, c. 30.

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Lord Chief Justice TINDAL.—It appears to me, upon the best consideration I have been able to give this case, that the evidence offered at the trial was properly rejected. The first question is, whether the deposition could have been received under the statute 5 Geo. 2, c. 30, s. 41? Now, in order to be competent evidence under that section, it must be a deposition that was duly enrolled. The next question, then, is, whether there is any power, as the law now stands, of enrolling a deposition under a commission issued and existing before the passing of the late act for the general amendment of the laws relating to bankrupts? It is quite clear that the statute 5 Geo. 2, c. 30 was repealed by the statute 6 Geo. 4, c. 16. I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded, whilst it was an existing law. It follows, therefore, that the 5 Geo. 2 having been repealed by the 6 Geo. 4, the power of enrolling under the former act terminated with it. Does then any thing in the statute 6 Geo. 4 give a power of enrolment in a case like the present? The 95th section has been mainly relied on; but I do not think that that clause can receive such a construction, as to give a retrospective effect to depositions which ought to have been enrolled under the previous act. That clause enacts, “that *all things done* pursuant to the act passed in the fifth year of King George the Second, *and hereby repealed*, whereby it was enacted that the Lord Chancellor should appoint a place where all matters relating to commissions of bankruptcy should be entered of record, and should appoint a person to have the custody thereof, be hereby confirmed.”

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This is not *a thing done* pursuant to that statute, as the deposition had never been carried to, or recorded by the officer appointed under the 5 Geo. 2; and the 96th section of the 6 Geo. 4, which is in continuation of the 95th, gives a sense to it, by shewing that the 96th, at least, only refers to commissions issued *after the act* should have taken effect. If, then, this is not a deposition receiving its validity as evidence, by virtue of any enrolment upon record, the question is, whether it could have been admitted in evidence simply as a deposition under the 92nd section of the statute 6 Geo. 4. That brings me to the more important question, whether that section has a retrospective effect, or, more properly speaking, whether it has any operation on commissions that were issued before the act was passed? I think the sound construction of that section, taking at the same time into consideration the 93rd, which follows it, and also the 135th, is to hold that it would not have such an operation. It seems to me, that if the 92nd section be considered as affecting commissions which were then in a course of operation, it would most materially alter the situation both of the bankrupt and of the parties claiming a remedy under the commission. It would alter the situation of the bankrupt, because it would enable his assignees and other persons, to conclude him as a bankrupt, without the possibility of giving him the opportunity to contest his bankruptcy within that period of time which the statute meant to allow him. Suppose, for instance, that he had been adjudicated a bankrupt more than two months before the act passed, or that he had been absent from this country for a twelvemonth, he would, in either case, be effectually concluded from all benefit of contesting the commission issued against him. It would also materially affect the interests of other persons, because, whenever the deposition is to be received as conclusive evidence, the 93rd section has provided, that parties who were called upon to pay their debts, should have a power, by the

space of two months, to pay their money into Court; during which period the question of bankruptcy might be tried. That power would also be taken away from them, and the construction contended for would entirely deprive them of the benefit of that clause. It therefore seems to me, that the 135th section, which states, that the construction of this act shall be such, as not to affect or lessen any right, claim, demand, or remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is therein specifically enacted, would not be duly observed, if we were to put a different construction on the statute from that which I have stated.

But it has been said, that there are several cases in which the construction given to this act has been, that it should apply to commissions which had been previously issued, and were then in the course of operation. I admit that such may be the case, where the law has been altered generally, or old provisions are re-enacted; because, such a general alteration of the law will apply, as part of the law of bankruptcy, to commissions issued before the new law is to come into operation; but where new provisions are introduced, which apply to particular cases, and give entirely new remedies, we must look at the very words of the clauses, in order to see whether or not they apply to by-gone commissions, or to commissions then existing and advancing towards their completion. Applying that rule to the 92nd section, it seems to me that the Legislature did not intend that it should affect or govern commissions then in existence. As to any hardship that may be wrought upon the assignees of bankrupts, or upon other parties who seek their remedy under the commission, it can only be said that the law which required enrolment under the statute 5 Geo. 2, continued up to the time of the passing the 6 Geo. 4, which repealed it, and that, if they did not think proper to have recourse to it to preserve those mu-

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niments which they say are material to ascertain the rights of bankrupts against other claimants, I can only apply to those the well-known maxim, "*vigilantibus, et non dormientibus, jura subveniunt.*" On the whole, therefore, it seems to me, that it is the assignees' own fault that any omission to enrol the deposition has affected them in this case.

Mr. Justice PARK.—As it appears from the report of the case of *Key v. Cooke*, that I was at chambers when the Court gave their opinion, I do not now recollect whether I concurred with them or not. But it is enough for me to say, that, from the luminous exposition which my Lord Chief Justice has just made to the Court, I am quite satisfied that the construction he has put upon the statute is the true construction, and which, as far as regards the 92nd section, is in accordance with the case of *Key v. Cooke*. Although there is a manifest inconsistency in several of the clauses of the act, I am of opinion that the deposition in question was properly rejected, and that the ruling of my Lord Chief Justice at *Nisi Prius*, was correct.

Mr. Justice GASELEE.—I think that this question raises a point of considerable difficulty. But considering that the Legislature meant that the 92nd and 93rd sections should be taken together, and that, if a different construction were put on the 92nd, than has been done by my Lord Chief Justice, it would have the effect of annihilating the 93rd as to all cases arising before the passing of the act—I am strongly inclined to think that the Court has come to a right conclusion.

Mr. Justice BOSANQUET.—I am of the same opinion. The Legislature having in some sections stated to what commissions the statute was intended to apply, and in others used general terms, the Court should be certain

that the 92nd clause, which is now under consideration, has a retrospective operation, so as to apply to antecedent commissions, before we give it that effect. But, after giving the best consideration to the construction of that clause that I am able, it appears to me to be impossible in this case to apply it to a commission that was sued out before the statute came into effect. That section, if it is to operate at all, makes depositions, when received, conclusive evidence of the matters therein contained; and we cannot say that the section shall so operate when we look at it, as it enacts, "that if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission), within two calendar months after the adjudication, or (if he was out of the United Kingdom), within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, the depositions taken before the commissioners shall be conclusive evidence of the matters therein contained. Now, in some cases, time was certainly given by the act to enable persons becoming bankrupt previously to the passing of the act, to avail themselves of commissions issued before the act was to come into effect; for it was passed on the 2nd *May*, 1825, and was not to take effect or to come into full operation until the 1st *September* following, with the exception of repealing the statute 5 *Geo.* 4, and all enactments relating to certificates of conformity, which were to take effect upon the passing of the 6 *Geo.* 4. This exception does not apply to the 92nd section, which, for the reasons given by my Lord Chief Justice, cannot operate on the present commission, which was sued out before the statute was passed. If the assignees, or any other parties interested in the commission, had been disposed to have availed themselves of an enrolment of the deposition in question under the statute 5 *Geo.* 2, they had an opportunity of doing so between the interval when the 6th *Geo.* 4 was passed, and the day it was to come into effect; but as they suffered that time to

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elapse, the assignees cannot now avail themselves of their own omission; and this rule must consequently be

Discharged.

Wednesday,
May 19th.

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In an action for a libel, the plaintiff alleged in his declaration, that the defendant had published of him in his profession or business of a proctor, that he had been suspended three times, once by Lord S., and twice by Sir J. N. The defendant, as to the publishing so much of the libel as charged the plaintiff with having been once suspended in his profession and business of a proctor, pleaded, by way of justification, that he had been suspended by Sir J. N., wherefore, the defendant published that the plaintiff had been once suspended in his profession of a proctor:—*Held*, that as the charge was severable, the plea was good on demurrer, and an answer to that part of the charge.

THIS was an action for a libel published in the *Times* newspaper, and which charged the plaintiff, a proctor, with having been suspended *three times* from practice for extortion. The defendant pleaded a justification, and alleged in the plea, that the plaintiff had been suspended *once* for extortion. The Court held, that this plea was bad on demurrer, as it did not justify the whole of the charge contained in the libel (a). There was another plea of justification, to which the plaintiff had replied *de injuriâ*, and upon which issue was joined. The plaintiff afterwards applied for leave to withdraw the replication, for the purpose of demurring to that plea also; which the Court allowed, on the terms of the defendant being at liberty to plead *de novo*. He afterwards filed, *first*, a plea of justification to the whole of the declaration, upon which issue was joined; and the *second* plea was as follows:—

And for a further plea in this behalf, the defendant saith, that, as to the publishing, and causing and procuring to be published, so much of the said supposed libellous matter, as imputes or charges to or against the plaintiff, that he, before the said several times, when &c., had been *once* suspended in his aforesaid profession and business of a proctor, above supposed to have been done by the defendant, he the defendant, by leave of the Court &c.,

(a) See 3 Moore & Payne, 605; S. C. 6 Bing. 266.

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saith, that the plaintiff ought not to have or maintain his aforesaid action thereof against him the defendant, because he saith, that the plaintiff, before the said several times when &c., in the said declaration mentioned, to wit, on &c., at &c., had been employed in the way of his aforesaid profession and business of a proctor, by one *Thomas Gillart*, and afterwards, and before the said several times when &c., to wit, on &c., last aforesaid, falsely, fraudulently, and extortionately, demanded of and from the said *Thomas Gillart*, as and for the sum of money justly due to him the plaintiff from the said *Thomas Gillart*, for the work and labour of him the plaintiff, as such proctor, done, performed, and bestowed in and about the business of the said *Thomas Gillart*, in pursuance of the last aforesaid employment, and for fees and disbursements due and made to and by him as such proctor, in respect thereof, a certain large sum of money, to wit, the sum of 19*l.* 14*s.* 4*d.*; whereas, in truth and in fact, the sum of money then and there justly due to him the plaintiff, in that behalf, then and there amounted to a much less sum of money, to wit, the sum of 9*l.* 19*s.* 8*d.*;—and the defendant further saith, that afterwards, and before the said several times when &c., to wit, on &c., Sir *John Nicholl*, Knight, then being Judge of the Prerogative Court of *Canterbury*, caused the aforesaid false, fraudulent, and extortionate demand to be taxed by the proper officers of the said Court, in that behalf, to wit, the Rev. G. M., C. M., Esq., and the Rev. R. M., Registrars of the said Court, and that the said officers, by their deputy in that behalf, did afterwards, and before the said several times when &c., to wit, on &c., report in the said Court, to the said Sir *John Nicholl*, as and being such Judge as aforesaid, according to the course and practice of the said Court, that, upon such taxation of the aforesaid false, fraudulent, and extortionate demand, a small part thereof, to wit, the sum of 9*l.* 19*s.* 8*d.*, only had been found justly due to the plaintiff from the said *Thomas Gillart*. And the defendant fur-

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ther saith, that thereupon, by reason of the premises, afterwards, and before the said several times when &c., to wit, on &c., the said Sir *John Nicholl*, as and being Judge of the said Court, did order, direct, and adjudge to be suspended, and did suspend, the plaintiff from exercising the business of a proctor of the said Court, for and during the space of one year then next following; and did then and there direct, that, at the expiration of the said space of one year, the plaintiff should be further suspended, until he should appear, and publicly make faithful promise to abstain from all malpractices in the future exercise of his business as a proctor in the said Court. And the defendant further saith, that the said Sir *John Nicholl* in this plea mentioned, and Sir *John Nicholl* in the said supposed libel named, are one and the same person; wherefore, the defendant, afterwards, at the said several times when &c., did publish, and cause and procure to be published, so much of the said supposed libellous matters in the said declaration mentioned, as imputes or charges to or against the plaintiff, that he, the plaintiff, before the said several times when &c., had been *once* suspended in his aforesaid profession and business of a proctor, as he the defendant lawfully might, for the cause last aforesaid, which are the same publishing, and causing and procuring to be published, the said supposed libellous matters, as are in the introductory part of this plea mentioned. And this &c., wherefore &c.

To this plea, the plaintiff demurred, and the defendant joined in demurrer.

The cause now came on for argument.

Mr. Serjeant *Cross*, in support of the demurrer.—The plea is bad in form and in substance, as it only contains an answer to part of the libel as set out in the declaration. In the first count (*a*), the plaintiff complains, that

(*a*) See 3 Moore & Payne, 605.

the defendant had published of him, in his profession of a proctor, that he had been suspended three times, once by Lord *Stowell*, and twice by Sir *John Nicholl*; and, in the second count, that he had been thrice suspended from practice for extortion. It is therefore no answer to say, that the plaintiff has been suspended *once*, and the plea is confined to that single assertion, without even stating for what cause the suspension was directed to be made. The charge that the plaintiff had been suspended three times, is not divisible. If the defendant had merely published that the plaintiff had been suspended once, he might not have had any reason to complain, as he might have been suspended at his own request. But the plaintiff is charged in the libel with having been suspended three times, by which the stigma on his character is not only increased, but habitual misconduct is thereby imputed to him. As, therefore, the charge is entire, and cannot be severed, and as the gist of the action is, that the defendant had published that the plaintiff had been suspended three times, it is no answer to say, that he had been suspended once. But the plaintiff has also been charged with having been thrice suspended from practice *for extortion*. The two charges are essentially different in their nature, for the latter would render the plaintiff a disgrace to his profession, whereas, he might have been suspended generally for a mere venial error, which might not affect his character or reputation. The plea, therefore, ought to have pointed out to which of the suspensions it was meant to apply; and as it commences by stating, that, as to the publishing of so much of the libellous matter as imputes to the plaintiff, that he had been once suspended in his business of a proctor, above supposed to have been done by the defendant, it applies to both counts of the declaration. The defendant, therefore, ought to have shewn with precision and certainty to which suspension he meant the plea to apply; it might have been an answer to a mere general charge of

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suspension, which might have arisen from the plaintiff's own act; but it cannot be an answer to a charge of suspension *for extortion*, which is a serious, if not an irreparable injury to his character.

Mr. Serjeant *Wilde, contra.*—*First*, it has been said that the charge in the libel, that the plaintiff had been suspended three times, is one single indivisible charge, but it is clearly severable and divisible. The suspensions, once by Lord *Stowell* and twice by Sir *John Nicholl*, must of necessity have been three several and distinct acts of suspension, and at three several times. If the defendant had published that the plaintiff had been suspended on three several occasions, there can be no doubt but that he might, after pleading to the whole of the declaration, have pleaded by way of justification to so much of it as related to one of those occasions. It is sufficient to justify a portion of a charge; and although the defendant would not have been permitted, under the general issue, to prove the truth of the libel, even in mitigation of damages, yet he may answer one of three several charges; and, if he had only pleaded not guilty, and offered evidence to shew that the plaintiff had been once suspended, it would be a surprise on the Court. He, therefore, most properly set it forth in his plea, in order that the plaintiff might know the ground of defence; and also to shew the occasion which warranted the publication of this part of the charge. If the defendant had charged the plaintiff with having stolen three horses at three different times, or from three different persons, he might justify as to the stealing of one. So here, the three acts of suspension are three several incidents, and the plea, as far as regards one of the suspensions, is sufficient, and a complete answer to that part of the charge. But it has been said, that as the introductory part of the plea refers generally to the suspensions mentioned in the declaration, the defendant should have

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shewn to which of the counts the plea was intended to apply. But the defendant, by way of inducement, alleges, that, as to the publishing so much of the libellous matter as charges against the plaintiff, that he had been once suspended in his business of a proctor, *above supposed to have been done* by the defendant, the plaintiff ought not to have his action against him. Now, the words, 'above supposed to have been done,' refer to the whole of the charge in the declaration; and the charge in both counts is substantially the same, *viz.* the suspension of the plaintiff three times from his practice as a proctor. That is the gravamen of the charge, and the substantive ground of the complaint, and the defendant need only disclose in his plea, what part of the charge he means to justify, *viz.* that the plaintiff had been once suspended by Sir *John Nicholl*. That suspension, of necessity, refers to the charge in the libel as set out in the first count of the declaration, and is a sufficient answer to that part of the charge. The body of the plea sets forth the nature and cause of the suspension, *viz.* for an extortionate demand, for which the plaintiff was adjudged to be suspended for the space of one year, which corresponds with the introductory part of the plea, in which the defendant alleged generally, that the plaintiff had been once suspended in his profession as a proctor.

Mr. Serjeant *Cross*, in reply.—As the first plea of justification is entire, and pleaded to the whole of the declaration, the plea demurred to need not have been put on the record; but as the defendant thereby attempts to justify so much of the said supposed libellous matter as imputes to the plaintiff that he had been once suspended in his business as a proctor, it must be taken to refer to the whole of the libellous matter charged in the declaration; and there is no count which refers to one suspension of the plaintiff, or to a single act of suspension. Although it has been said, that the defendant may subdivide the several acts of

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suspension, and justify for one only, yet the body of the plea is inconsistent with the introductory part, which only refers to the plaintiff's having been once suspended in his profession as a proctor, whereas, in the body of the plea, it is stated, that he was suspended for having made a fraudulent and extortionate demand. As, therefore, the plea commenced as an answer to part of the charge only, but the body professed to answer the whole, it is bad, according to the case of *Gray v. Pindar* (a), where, to *assumpsit* on a promissory note payable by instalments, the defendant pleaded in bar as to the said several causes of action, except the last instalment, that 'the said several causes of action did not, nor did any of them, accrue within six years;' it was held on demurrer, that although some of the instalments might be barred, and others not, yet that the introduction to the plea, and the body of it, were inconsistent, the defendant having, by the introductory part, confined his answer to part only of the declaration, whilst the subsequent matters introduced into the body of the plea amounted to an answer to the whole.

Lord Chief Justice TINDAL.—The plaintiff has declared on a libel published by the defendant, of and concerning the plaintiff in his profession or business of a proctor, and which imputes to him, as set out in the first count of the declaration, that he had been suspended three times, once by Lord *Stowell*, and twice by Sir *John Nicholl*, and in the second count he is charged with having been thrice suspended from practice for extortion. The plea demurred to, and to which alone it is necessary to bring our attention, commences by stating, that, 'as to the publishing, and causing and procuring to be published, so much of the said supposed libellous matter' as imputes or charges to or against the plaintiff, that he, before the said

(a) 2 Bos. & Pul. 427.

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several times when &c., had been *once* suspended in his aforesaid profession and business of a proctor, above supposed to have been done by the defendant, and then proceeds to justify by averring that the plaintiff had been suspended by Sir *John Nicholl*, as Judge of the Prerogative Court, from exercising the business of a proctor for the space of one year, for his having made a false, fraudulent, and extortionate demand:—wherefore the defendant afterwards, and at the said several times when &c., did publish, and cause and procure to be published, so much of the said libellous matters in the said declaration mentioned, as imputes or charges to or against the plaintiff, that he the plaintiff, before the said several times when &c., had been *once* suspended in his aforesaid profession and business of a proctor, as the defendant lawfully might, for the cause last aforesaid. To this plea the plaintiff has demurred, and two objections have been raised in support of the demurrer—*first*, that, upon principle, the imputation or charge on the plaintiff, as contained in the libel, is not severable or divisible; and therefore that the plea is bad, as it only attempts to answer a part of the libel as set out in the declaration; and *secondly*, that even admitting that the charge might be severable, the plea does not sufficiently point to the particular charge in the declaration which the defendant intended to justify. With respect to the first objection, on looking at the libel as set out in the declaration, I am of opinion that the charge is severable and divisible, inasmuch as there is a material difference between an unfounded charge of one suspension, or of three several suspensions, and the measure of damages would vary accordingly. The principle upon which the action for libel proceeds, is malice in the defendant, and a damage or injury sustained by the plaintiff in consequence of the publication of the libel; and when the defendant shews that malice does not exist, it is matter in mitigation of damages. So, if he can shew that the whole of the supposed libel is

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true, the allegation of the existence of malice is negatived and answered. Again, if the defendant prove that the libel is true in part, such part is severable from the whole of the charge, and the plaintiff ought not to recover damages for that part which is so proved to be true. It would be a great hardship on the defendant if it were otherwise; for if he had only pleaded the general issue of not guilty, he could not have been permitted to prove the truth of the libel, even in mitigation of damages; and if he wished to justify part of the charge contained in the libel, he was bound to set it forth formally on the record, by way of justification, in order that the plaintiff might be furnished with the ground of defence, and be prepared to answer it. But if the defendant were precluded from pleading a justification as to part of the charge, because he could not answer the whole, the plaintiff might recover damages, although the libel was not published in the malicious sense imputed by the declaration, but with an innocent view, or on an occasion which warranted the publication, and although the plaintiff might have sustained no injury; and it frequently happens that the part of the libel attempted to be justified, if proved, is an answer to the substance of the charge or injury complained of. I agree that if a charge cannot be severed, or is not divisible in its nature, the defendant must justify to the full extent of such charge:—for instance, upon a charge of murder, it would be no justification to allege in the plea that the party had been found guilty of a crime amounting to manslaughter, because such a plea would not confess or avoid the crime imputed to him. But here the charge is several and divisible, for in the libel it is stated that the plaintiff had been suspended three times. It is therefore equivalent to saying that he had been suspended on three different days; if so, there can be no doubt but that the defendant might confine his justification to one of those days, leaving the plaintiff to shew the damage or injury he had sus-

tained from the other part of the charge. In *Stiles v. Notes* (a), which was an action for a libel charging the plaintiff with having committed perjury and been guilty of delinquency in his office as clerk to the court of requests, and, in a plea of justification, extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated; Lord *Ellenborough* said (b), "The account of the proceedings in Court is so interwoven with the comments, that we cannot with certainty separate them throughout, although we can see plainly enough that certain parts are an overcharged account of the judicial proceedings. The Court cannot decompose this mass: but the party who requires the separation to be made for his own defence, ought to have taken upon himself the burthen of doing it, in order that the Court might see with certainty *what parts he meant to justify*. If they cannot be separated by the industry of the pleader, how can they be so by general reference? If they can be so separated, they ought to have been." And Mr. Justice *Le Blanc* said—"A plea of justification may be good with a general reference to certain parts of the libel set forth in the declaration, if the Court can see with certainty what parts are referred to; as if the reference be to so much of the libel as imputes to the plaintiff such a crime (*e. g.* perjury), that would be sufficient, without repeating all those parts again, which would lead to prolixity of pleading, and ought to be avoided." That appears to me to apply to this case, and to be a sufficient answer to the first objection, as the defendant has separated the charge, and confined his justification to one act of suspension only. But, secondly, it has been objected, that the plea is not sufficiently pointed to the particular charge in the declaration which it is intended to meet, as the defendant has only attempted to justify so much of the libel as charges the plain-

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(a) 7 East, 493.

(b) Id. 506.

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tiff with having been *once* suspended in his profession and business of a proctor. But it is sufficiently applicable to the first count of the declaration, where the plaintiff is merely charged with having been suspended three times, without assigning any cause or reason for such suspensions. The plea, therefore, is clearly an answer to one of them; but I am further inclined to think, that, by the introductory words, 'above supposed to have been done by the defendant,' the charge of suspension for extortion, as alleged in the second count, might be incorporated in the plea; in which the defendant has alleged in terms, that the plaintiff had made a false, fraudulent, and *extortionate* demand on one of his clients, by reason of which he was ordered to be suspended by the Judge of the Prerogative Court, and was accordingly suspended for the space of one year; I am therefore of opinion, that this demurrer to the second plea must be over-ruled.

Mr. Justice PARK.—I am of the same opinion. I at first doubted whether the introductory part of the plea should not have gone on to state that the plaintiff had been *once* suspended *for extortion*; but the libel, as set out in the first count of the declaration, only charges him with having been suspended three times generally, and not that he was suspended for extortion. I am convinced, from the argument in support of the plea, and from what has fallen from my Lord Chief Justice, that it is an answer to part of the charge contained in the libel, as it is divisible. The imputation complained of in the first count, relates, in effect, to three different periods, for it is stated, that the plaintiff had been suspended three times, once by Lord *Stowell*, and twice by Sir *John Nicholl*; and as they do not sit in the same Court, the alleged acts of suspension must have been distinct, and on different days. I accede to the proposition put by my brother *Wilde*, that if a party be charged with having stolen three horses belong-

ing to three different persons, the defendant may justify as to one, and aver that the party charged did steal the horse of *A. B.* Here, as the defendant in his plea has alleged that the plaintiff had been suspended by Sir *John Nicholl*, if he prove that fact, it will go in mitigation of damages; and as, in the introductory part of the plea, the defendant says that the plaintiff ought not to have or maintain his action against him *as to so much* of the libellous matters as charges against the plaintiff that he had been once suspended in his profession of a proctor, *above supposed to have been done* by the defendant, it covers the whole of the charge in the declaration, or, at all events, that part of the charge contained in the first count. I am therefore of opinion that the defendant is entitled to judgment on this plea.

Mr. Justice GASELEE.—I take it for granted, that if a party who charges another with having been three times punished for the commission of three distinct offences, and proves that one only had been committed, the party charged would be entitled to larger damages than if he had been only charged with two. It therefore follows, that the defendant in this case might either put on the record, or give in evidence, that the plaintiff had been once suspended by the order of Sir *John Nicholl*, which would certainly have the effect of reducing the damages which the plaintiff sought to recover for the charge of having been thrice suspended from his practice of a proctor. I am rather inclined to think that the fact of one suspension only could not be given in evidence under the general issue. If not, the defendant was surely entitled to plead it; and if, in the introductory part of the plea, he had stated that, as to so much of the libellous matter as charged the plaintiff with having been suspended in his profession of a proctor, *for extortion*, it would not have been an answer to the first count of the declaration, where the plaintiff is

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only charged with having been suspended three times, without assigning any reason for such suspension. The introduction of the plea, therefore, being pointed to the fact of the plaintiff's having been once suspended, such suspension necessarily means a suspension in the manner charged in the declaration, and which distinctly applies to the first count. But, in the body of the plea, the defendant in common parlance states that the plaintiff had been suspended for extortion; for he says, that the plaintiff had been employed in the way of his profession, as a proctor, by one *Thomas Gillart*; that he fraudulently and extortionately demanded from *Gillart*, a certain sum for work and labour, and fees due to him as such proctor; that Sir *John Nicholl* caused the said false, fraudulent, and extortionate demand to be taxed by the proper officers of the Court; and that they reported, that, upon such taxation, of the aforesaid false, fraudulent, and extortionate demand, a small part thereof, to wit, the sum of 9*l.* 19*s.* 8*d.* only, had been justly found due to the plaintiff from *Gillart*; and that thereupon, by reason of the premises, Sir *John Nicholl*, as and being Judge of the Prerogative Court, did afterwards order and direct, and adjudge to be suspended, and did suspend, the plaintiff from exercising the business of a proctor of the said Court, for and during the space of one year then next following.

MR. JUSTICE BOSANQUET.—I am of the same opinion. As the first plea is pleaded to the whole of the declaration, and upon which issue is joined, there is no discontinuance, and the defendant has a right to put a second plea on the record, applicable to a part of the charge only, where such charge is in its nature severable. The libel, as set out in the declaration, imputes to the plaintiff that he had been suspended three times. These are three distinct charges of suspension, and the defendant had a

right to justify as to either of the three, with a view to lessen the damages:—for the suspensions must have been distinct and separate acts. It was not necessary for the defendant to state, that the plaintiff had been suspended for *extortion*, and the introductory part of the plea applies expressly to the first count of the declaration; and the defendant alleges that the plaintiff had been suspended by the order of Sir *John Nicholl*. But it appears to me, that the introduction of the plea is equally applicable to the second count, for the words ‘above supposed to have been done by the defendant,’ have reference to the whole of the declaration, and the mode in which the suspension is there alleged to have taken place; and in the body of the plea it is alleged that the plaintiff was suspended for having made a false, fraudulent, and *extortionate* demand on one of his clients. That, therefore, shews that he was suspended from his practice for extortion, and meets the charge in the second count of the declaration; and although it is there alleged, that the plaintiff was *thrice* suspended, the defendant had a right to plead, by way of justification to a part of that charge, that he had been *once* suspended by the order of Sir *John Nicholl*. The demurrer to this plea, therefore, must be over-ruled, and the defendant is entitled to judgment.

Judgment for the defendant.

1830.

CLARKSON
v.
LAWSON.

1830.

Thursday,
May 13th.

Where the defendant obtained his certificate as a bankrupt, after issue joined, and before trial, but did not plead it *puis darrein continuance*, and the plaintiff proceeded to trial and obtained judgment; the Court refused to order an *exoneretur* to be entered on the bail piece, although the plaintiff's attorney knew, before the trial, that the defendant had got his certificate;—because the bail were still in a condition to render the defendant.

HUMPHREYS v. KNIGHT (a).

THIS was an action for goods sold and delivered to the defendant in *March*, 1829. The declaration was delivered in the last *Michaelmas* Term, and a plea demanded on the 2nd *December* following. The defendant pleaded the general issue. Issue was joined on the 28th *January*, and notice of trial given for the first Sittings in the last Term. On the 6th *November*, a commission of bankrupt was sued out against the defendant, and he obtained his certificate on the 4th *February*; and four days afterwards, *viz.* on the 8th, and previously to the trial, the defendant's attorney gave the plaintiff's attorney notice, that the defendant had obtained his certificate, and that it had been duly enrolled at the enrolment office. The plaintiff's attorney, notwithstanding this, proceeded to trial, and obtained a verdict, upon which judgment was afterwards entered up. Under these circumstances—

Mr. Serjeant *Adams*, on a former day in this Term, on behalf of the defendant's bail, obtained a rule *nisi* to enter an *exoneretur* on the bail piece; to which the learned Serjeant submitted the bail were entitled under the provisions of the statute 6 *Geo.* 4, c. 16, ss. 121 (b) and 126 (c), the

(a) See the next case.

(b) Which enacts “that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the

commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed.”

(c) By which it is enacted—“that any bankrupt, who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand, hereby made proveable under the com-

defendant having obtained his certificate under the commission after issue joined, and before the trial of the cause.

1830.

HUMPHREYS

v.

KNIGHT.

Mr. Serjeant *Wilde*, afterwards, *vis.* on the 13th instant, shewed cause. The defendant, in order to avail himself of his certificate, might and ought to have pleaded it, *puis darrein continuance*. The 126th section of the statute had two objects in view. The former part of the clause provides that any bankrupt who *shall be* arrested after his certificate shall have been allowed, for any debt made proveable under the commission, shall be discharged upon common bail;—and the latter part of the clause directs, that, if any bankrupt shall be taken in execution, or detained in prison for a debt proveable under the commission, where judgment has been obtained *before* the allowance of his certificate, it shall be lawful for a Judge of the Court wherein the judgment is signed, to order him to be discharged, on his producing his certificate. Neither of these provisions applies to the defendant, as the action was commenced against him before he procured his certificate, and the judgment was not obtained until afterwards; and if he had pleaded his certificate *puis darrein continuance*, he would on producing it have been entitled to his discharge as a matter of course. In *Clarke v. Hoppe* (a),

mission against such bankrupt, shall be discharged upon common bail, and may plead in general, that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate; and if any such bankrupt shall be taken in execution, or detained in prison

for such debt, claim, or demand, where judgment has been obtained before the allowance of his certificate, it shall be lawful for any Judge of the Court wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt without exacting any fee; and such officer shall be hereby indemnified for so doing."

(a) 3 Taunt. 46.

1830.
 HUMPHREYS
 v.
 KNIGHT.

where, after action brought, the defendant became bankrupt, and obtained his certificate, but omitted to plead it and allowed judgment to be signed against him for want of a plea, after which the plaintiff proceeded against the bail, the Court refused to relieve them on motion; and Sir *James Mansfield* said—"In every case the bail put themselves in the hazard of suffering by the folly and negligence of the defendant; and although the common rule is, that if the bail be not fixed before certificate obtained, they are discharged, yet here, there has been a neglect to plead the certificate;" and Mr. Justice *Heath* said—"It is the business of the bail to watch the proceedings (a)." Although that case was decided under the statute 5 *Geo. 2*, c. 30, the principle is applicable to the present. Besides, the bail here are still in a condition to render the defendant, and therefore the Court will not relieve them on a summary application.

Mr. Serjeant *Adams*, in support of his rule.—It is a general rule that, where a bankrupt is entitled to his discharge, the Court will order an *exoneretur* to be entered on the bail piece without the form of a surrender by the bail. In *Clarke v. Hoppe* the proceedings took place before the statute 49 *Geo. 3*, c. 121, was passed. It therefore cannot apply to the question now before the Court, which must depend on the construction to be given to the 121st and 126th sections of the statute 6 *Geo. 4*, c. 16. In *Tidd's Practice* (b), it is said—"Formerly, if the defendant had become bankrupt and obtained his certificate before the bail were fixed, the method was for the bail to surrender him, and then for the defendant to apply to be discharged, upon an affidavit, stating his having become bankrupt since the cause of action arose, and obtained a certificate of his conformity under the commission. But, of late, when a bankrupt is clearly entitled to his dis-

(a) And see *Swayne v. Robertson*, 4 Dow. & Ryl. 373.

(b) Vol. 1, 9th Edit. 292.

1830.

HUMPHREYS
v.
KNIGHT.

charge, the Court on motion, or a Judge on summons, to avoid circuitry, have ordered an *exoneretur* to be entered on the bail piece, or in the filacer's book, without the form of a regular surrender by his bail." Here, by the 121st section of the statute, the defendant, the moment he obtained his certificate, was entitled to be discharged from all debts due by him when he became bankrupt, as well as from all claims and demands which were proveable under the commission. Although, in *Woolcot v. Leicester* (a), the Court refused to exonerate the bail, though the defendant had become bankrupt, and obtained his certificate; yet it was surmised that the certificate had been unfairly obtained, and the Court directed an issue to try that fact. In *Joseph v. Orme* (b), where the acceptor of a bill of exchange became bankrupt after an action brought against him at the suit of the indorser, and afterwards obtained his certificate, the Court not only held that he was discharged from the debt, but ordered an *exoneretur* to be entered on the bail piece. So, in *Harmer v. Hagger* (c), where the defendant became bankrupt after action brought, and afterwards obtained his certificate, after which proceedings were taken against the bail, the Court relieved them on a motion to set aside the proceedings, it being shewn that the plaintiff and his attorney knew that the bankrupt had obtained his certificate before they took any proceedings against the bail; but the Court thought that the bail should have applied for an *exoneretur*, which they have accordingly done in this case; and it appears that the plaintiff's attorney knew that the defendant had obtained his certificate before the cause was tried. If, therefore, the defendant was discharged by his certificate, so are his bail; and they are consequently entitled to the relief they now seek, by having an *exoneretur* entered on the bail piece.

(a) 6 Taunt. 75. (b) 2 New Rep. 180. (c) 1 Barn. & Ald. 332.

1850.
HUMPHREYS
v.
KNIGHT.

Lord Chief Justice TINDAL.—The bail, no doubt, stand in the same situation as the bankrupt; and if they had been damnified by any thing that has taken place, so as to be deprived the power of rendering their principal, the Court might have been induced to attend to this application on their behalf; but they may now relieve themselves by rendering the defendant, as they are clearly in a condition to do so; and no authority has been cited to shew, that, where a bankrupt has omitted to plead his certificate, he can avail himself of it; and here, he certainly ought to have pleaded it *puis darrein continuance*. It therefore seems to us, that the better course will be to discharge this rule; and the defendant may hereafter make any application to the Court which his counsel may think advisable.

The rest of the Court concurring—

Rule discharged (a).

(a) But see *Todd v. Maxfield*, 3 Barn. & Cress. 222; S. C. 5 Dow. & RyL. 258, where the defendant obtained his certificate before trial, but did not plead it *puis darrein continuance*; the Court ordered an *exoneretur* to be entered on the bail piece, and said—"the general rule is, that where the

bankrupt is entitled to his discharge, the Court will relieve the bail. The bankrupt was entitled to his discharge if his certificate was valid, and therefore this case falls within the general principle. The case of *Clarke v. Hoppe* has never been acted upon in this Court."

1830.

SAME v. SAME.

Friday,
May 21st.

THE defendant having been surrendered to the *Fleet* prison, on the 18th instant, in discharge of his bail—

Mr. Serjeant *Adams*, on the following day, obtained a rule nisi for his discharge, pursuant to the statute 6 Geo. 4, c. 16, ss. 121 and 126 (a).

Mr. Serjeant *Wilde* now shewed cause.—As the defendant did not plead his bankruptcy and certificate, *puis darrein continuance*, he is not entitled to be discharged, and the Court will not interfere to relieve him on motion, but leave him to his remedy by *audita querela*. Although the 121st section of the statute enacts, that a bankrupt shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands proveable under the commission, in case he shall obtain a certificate of conformity, yet such certificate is subject to such provisions as thereafter directed. The 121st section, therefore, is subject to the provisions contained in the 126th; and as the action was brought against the defendant *before* he procured his certificate, and the judgment was not obtained until *after* the allowance thereof, he is not entitled to his discharge on the summary mode pointed out by that clause. When he procured his certificate, he should have pleaded it, or, at all events, he should have put it on the record previously to the trial.

Mr. Serjeant *Adams* in support of his rule.—When the defendant obtained his certificate, he was discharged from all debts due by him when he became bankrupt, and from all claims and demands proveable under the commission; for, in *Bonteflour v. Coats* (b), it was held, that a certi-

Where the defendant obtained his certificate after issue joined, and before trial, but did not plead it *puis darrein continuance*, and the plaintiff proceeded to trial, and obtained judgment; after which the bail rendered the defendant:—*Held*, that he was entitled to be discharged on a summary application to the Court under the 6 Geo. 4, c. 16, s. 121.

(a) See *ante*, p. 370.

(b) Cowp. 25.

1830.
HUMPHREYS
v.
KNIGHT.

ificate discharges a bankrupt from a debt accruing *before* the commission, although judgment be not obtained till *after* the allowance of the certificate. Although it has been said, that the defendant was bound to plead his certificate in bar, yet if he had produced it to a Judge of the Court in which the judgment was signed, he would have ordered him to be discharged; for the object of the 126th section is to relieve a bankrupt on a summary application, when he has obtained his certificate, which, by the 121st section, discharged the defendant from the plaintiff's claim in this action, as the debt was due before he became bankrupt, and was consequently proveable under the commission. Although, in *Clarke v. Hoppe*, this Court refused to relieve the bail, yet in *Todd v. Maxfield* (a) the Court of *King's Bench* ordered an *exoneretur* to be entered on the bail piece. There the defendant obtained his certificate before the trial, but did *not* plead it *puis darrein continuance*; and the Court said, that the general rule is, that where the bankrupt is entitled to his discharge, the Court will relieve the bail; and here, as they have rendered the defendant, and all his property is vested in his assignees, and it has not been suggested that he obtained his certificate by fraud, the Court, in their equitable jurisdiction, will grant him that relief to which he is justly entitled.

Lord Chief Justice TINDAL.—The Court will decide this case on the principle to be drawn from the 121st section of the statute 6 *Geo.* 4, c. 16. By the former provisions of that act, all the bankrupt's property is taken from him, and is vested in his assignees; and that clause enacts, "That every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts, at the time of issuing the commission against him, shall be discharged from all debts due

(a) 3 *Barn. & Cress.* 222; *S. C.* 5 *Dow. & Ryl.* 258.

by him when he became bankrupt, and from all claims and demands thereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as thereafter directed." This is a general provision, and operates as a complete discharge of the bankrupt from all debts due by him when he became bankrupt, and all demands proveable under the commission, and he is entitled to such discharge the moment he obtains his certificate. Although the defendant had an opportunity of pleading his certificate *pari darrein continuance*, it was not absolutely necessary that he should do so; and it would be too much to say, that the mere omission of putting the plea on the record, should deprive him of a summary application to the Court, or that he should be left to his remedy by *audita querela*.

1830.

HUMPHREYS

v.

KNIGHT.

The rest of the Court concurring—

Rule absolute.

DOE, on the Demise of Lord TEYNHAM, v. TYLER.

THIS was an action of ejectment, and brought to recover the possession of certain estates in the county of *Kent*. The only question in the cause was, whether a recovery suffered at the bar of this Court in *Michaelmas* Term, 1789, by *Henry*, the twelfth Lord *Teynham*, the father of the lessor of the plaintiff, was a valid recovery? The lessor of the plaintiff insisted that his father was not of sound mind at the time the recovery was suffered; and that, if he was not in fact a lunatic, still, that he was so weak in intellect, as to be influenced, or liable to be practised upon by persons whose interest it was to have the recovery suffered. There was much conflicting evidence on this point,

Friday,
May 21st.

The Court will not set aside a verdict and grant a new trial on account of the admission of evidence which ought not to have been received, if there be sufficient without it to authorize the finding of the Jury.

Quære, whether a paper containing entries of accounts by a deceased steward, who debited himself with sums re-

ceived on the one side, and discharged himself by disbursements on the other, and at the end was an entry in his handwriting, stating that he had paid the balance to his employer, is admissible in evidence?

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 }
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and a number of most respectable witnesses were called for the defendant, who spoke to Lord *Teynham's* competency to transact all the ordinary affairs of life, both before and after the recovery was suffered; and, among other documentary evidence, a paper, containing the accounts of one *Bryan Fawcit*, a deceased steward of the twelfth Lord *Teynham*, were put in, and which was produced by his widow, who proved her husband's handwriting; and on one side of the account he charged himself with the receipt of certain sums of money for rent paid on account of Lord *Teynham*, and on the other side he discharged himself by sundry disbursements made for his Lordship's estate; and at the bottom of the paper there was this entry, in the steward's handwriting—

“ 15th *July*, 1796. Paid the balance to Lord *Teynham*,
 “ at his house. *B. Fawcit.*”

This paper was handed to the Jury, after the defendant's counsel had stated that it was a most important document for him; and the Jury, having examined it, said, that they were perfectly satisfied, and returned a verdict for the defendant.

Mr. Serjeant *Jones*, in the last term, applied for a rule *nisi* to set aside this verdict, and have a new trial, on the grounds—*First*, that the answers of the uncle of the lessor of the plaintiff to interrogatories put to him in *France*, when he was ninety years of age, had been improperly rejected in evidence:—but, as he was a remainder-man in tail, the Court, after argument, and taking time to consider, held that they were not admissible, as he might have received an immediate benefit or injury by the determination of the cause in which his testimony was offered. The rule, therefore, was refused on that ground, and a rule *nisi* granted on the other, which was, that the above accounts of the steward ought not to have been received in evi-

dence, inasmuch as, upon the whole, they tended to discharge him, as he stated at the bottom of the paper, that he had paid over the balance to Lord *Teynham*. The learned Serjeant submitted, that there was no evidence to shew that his Lordship had ever seen or examined those accounts; and the principle upon which entries in books of deceased persons have been admitted in evidence, is when they charge themselves with the receipt of money on the account of a third party, or acknowledge the payment of money due to themselves; in either of which cases, the entry is to their own immediate prejudice, and against their interest at the time it was made; therefore, in *Higham v. Ridgway* (a), a written memorandum by a deceased man-midwife, in a book, stating that he had delivered a woman of a child on a certain day, and referring to his ledger, in which a charge for his attendance was marked as *paid*, it was thought by the Court to have been properly received in evidence upon an issue as to the child's age, on the ground that the entry was made by a person, who, so far from having an interest to make it, had an interest the other way, and the discharge in the book repelled the claim which he would otherwise have had. In *Barry v. Babbington*, Mr. Justice *Ashhurst* said (b), "the rule is, that if a steward's entry be sufficient to charge him, it is admissible evidence." That is the true principle; but here the steward *discharged* himself, by having stated at the bottom of the account, that he had paid the balance to Lord *Teynham*.

Lord Chief Justice *Tindal*, on a former day in this Term, having read from his report the whole of the evidence adduced at the trial, and stated that he had left it to the Jury to say, whether, from all the documentary and parol proof before them, the twelfth Lord *Teynham* was of sound mind in 1789, when the recovery was suffered?—

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 —————
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(a) 10 East, 109.

(b) 4 Term Rep. 516.

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The Court said, that the question had not only been properly left, but that it was competent to the Jury to decide it; and they intimated a strong opinion that there was sufficient evidence to sustain the verdict for the defendant, independently of the paper writing containing the entries of the accounts in question.

Mr. Serjeant *Wilde* was now about to shew cause, when the Court called on—

Mr. Serjeant *Jones* to support his rule.—The question the Court has to consider resolves itself into two branches—*First*, whether evidence was received at the trial, which was not admissible by the rules of law;—and *secondly*, whether the Court can now say, that, independently of the evidence so admitted, there was sufficient to warrant the Jury in coming to the conclusion they did. The paper in question, as containing entries of accounts by the steward of Lord *Teynham*, at a period subsequently to the passing of the recovery, no doubt had a strong impression on their minds, for, having examined it, they said they were perfectly satisfied, and found a verdict for the defendant. There was no evidence that the twelfth Lord *Teynham* ever saw or heard of the accounts, or that he was competent to examine them or adjust the balance. The steward might have made the entries, whether his Lordship were in a sound state of mind or not, and he might have received rents for him although he were a lunatic. But the steward actually discharged himself by writing at the bottom of the paper that he had paid the balance to Lord *Teynham* on a certain day. It is impossible, therefore, for the Court to say what effect that paper might have had on the minds of the Jury, or to ascertain whether their verdict was not founded on the inspection of that document alone; and, if it were not admissible in point of law, the lessor of the plain-

tiff is clearly entitled to a new trial. It certainly ought not to have been received, as the principle deducible from all the authorities is, that entries made by stewards and other agents, charging themselves with the receipt of money, are admissible in evidence after their death, to prove the fact of the receipt of such money, as such entries are against the interests of such persons at the time they were made. That, however, cannot apply to the case of a steward who wholly discharges himself by an alleged payment of the balance at the foot of an account, when he has charged himself in the body of it on the one side, and partly discharged himself on the other (a).

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Lord Chief Justice TINDAL.—I am of opinion that this rule for a new trial must be discharged. I will assume, for the purpose of this discussion, although I abstain from giving any opinion on the point, as we have not heard my brother *Wilde*, that the evidence now objected to had been improperly admitted; yet, according to the long and established practice of this Court and the Court of *King's Bench*, and on the principle of common sense, upon an application for a new trial, we are not to close our eyes at the rest of the evidence which was before the Jury; and if we see that there is sufficient, not merely to make the scales hang even, but greatly to preponderate in favour of the party who has obtained a verdict, we ought not to send the cause down to a second Jury. It is true, we cannot say what passed in the minds of the Jury at the trial, or what weight a particular portion of evidence might have had, but we have a much shorter and a plainer course, and the question is, whether the Court, having heard the whole of the evidence read from the Judge's report, are

(a) See *Middleton v. Melton*, 10 Barn. & Cress. 317, where all the cases on this subject are referred to, and commented on by the Court.

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satisfied that there is sufficient to warrant the finding of the Jury, if the evidence objected to had not been tendered or received. Now, I am of opinion, from all the evidence before me at *Nisi Prius*, that it greatly preponderated in favour of the defendant. Upon this point, however, I forbear saying any more at present, as it may prejudice the plaintiff in case he should be advised to bring another action of ejectment; if not, he has a remedy, if he thinks fit, by a writ of *formedon*. In *Horford v. Wilson* (a), the Court refused to set aside a verdict on account of the admission of evidence which ought not to have been received, provided there were sufficient without it to authorize the finding of the Jury. That case was cited by Mr. Justice Dallas in *Nathan v. Buckland* (b), for the purpose of shewing, that if there be sufficient evidence to warrant a verdict without the admission of the testimony of a witness which was improperly received, the Court, looking into the circumstances of such particular case, will not set aside the verdict; and here I am of opinion that, on looking at the whole of the evidence in this case, the Jury acted rightly in coming to the conclusion they did.

Mr. Justice PARK.—I entirely concur with my Lord Chief Justice in the opinion he has just pronounced, and will assume, for the purpose of this argument, as I did in *Nathan v. Buckland*, that the paper containing the accounts in question was improperly admitted at the trial. But I am not prepared to say, that it ought not to have been received; and whether admitted or not, it will have no weight on my mind, as, when we look at and consider the rest of the evidence in the cause, it appears to me to be abundantly sufficient to warrant the Jury in finding a verdict for the defendant. From a long established and well known practice, the Courts have refused to grant a new

(a) 1 Taunt. 14.

(b) 2 B. Moore, 156.

trial upon the ground of the improper rejection of evidence, where that evidence went merely to prove a fact which had already been proved by other means. In *Horsford v. Wilson*, Sir James Mansfield stopped Mr. Serjeant Best, in support of his argument for a new trial, which was applied for, on the ground, among others, that parol evidence to prove the contents of a letter had been improperly admitted, and said (a)—“The Court will not set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the Jury”—upon which the learned counsel pressed the point no further. In *Edwards v. Evans* (b), it was held to be no ground for granting a new trial, that a witness called to prove a certain fact was rejected on a supposed ground of incompetency, when another witness who was called, established the same fact, which was not disputed by the other side. I adverted to that case in *Nathan v. Buckland*, which appears to me to be precisely in point. There, the question was, whether certain goods were the property of the plaintiff alone, or jointly with a third person who was called to prove that fact; but it having been shewn by evidence *aliunde*, Mr. Justice Dallas, after argument for a new trial, on the ground that the testimony of this witness had been improperly received, said (c)—“It is unnecessary to consider whether this witness ought to have been rejected or not; for, if he were inadmissible, the only effect would be to send the cause to a new trial. If he had not been called, I think there would not only have been sufficient evidence to warrant the Jury in finding a verdict for the defendant, but that such verdict might be supported.” This, therefore, is no new point, and I am clearly of opinion, that, from the whole of the evidence reported to us by my Lord Chief Justice, there was sufficient, inde-

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(a) 1 Taunt. 14.

(b) 3 East, 451.

(c) 2 B. Moore, 155.

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pendently of the paper writing in question, to warrant the Jury in finding a verdict for the defendant.

Mr. Justice GASELEE.—Assuming that the evidence in question ought not to have been received, and that, by refusing this application for a new trial, we should close the door against the lessor of the plaintiff's proceeding further, I should pause before I delivered my opinion; but it is open to him to bring another action of ejectment, as the time for so doing has not yet expired. It has been said, that the paper containing the settlement of the accounts in question, was the only solemn act of the twelfth Lord *Teynham* that was produced in evidence, for the purpose of shewing that he was of sane mind after the recovery was suffered; but it was only produced to shew one of several acts, all of which tended to prove that he possessed sufficient faculties to transact the ordinary business of life. Although, therefore, the document might have been improperly received, yet, as there was sufficient evidence without it, to warrant the Jury in coming to the conclusion they did, I think we ought not to disturb their verdict, and consequently, that the rule for a new trial must be discharged.

Mr. Justice BOSANQUET.—I am of the same opinion. The granting a new trial is always a matter in the discretion of the Court: a discretion, indeed, not to be exercised capriciously, but subject to the rules of practice that have obtained, and which are founded on the principles of justice; and I think we shall not violate either of these rules or principles by refusing to grant a new trial in this case. Whether the Jury might have been influenced by the production and examination of the accounts, it is not for me to say; for, if they had laid them aside altogether, there was abundant other evidence to warrant their verdict;—as it was shewn, both by documentary and parol proof,

that the twelfth Lord *Teynham* was competent to conduct his affairs in the year 1789, when the recovery was suffered; and the paper writing in question referred to accounts and transactions which took place several years afterwards.

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Rule discharged (a).

(a) In the case of *The King v. Toul* (11 East, 311), where a witness admitted herself to have been connected with different men, and the Judge thought it immaterial to hear witnesses tendered by the defendant to show her connection with other persons, as leading merely to the same conclusion as

to her character, the Court, being satisfied that this could have had no influence on the verdict, refused a new trial on that account, Lord *Ellenborough* observing, that if the evidence had been admitted, it could have made no difference, at least, it ought not to have made any difference in the verdict.

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THIS was an action for use and occupation. On the 5th February, last, the plaintiff and defendant entered into an agreement in writing, by which the latter agreed to pay the former the sum of 12*l.* in satisfaction of the sum sought to be recovered in this action, and each party was to pay his own costs. The defendant accordingly paid the plaintiff the above sum, and he gave the defendant a receipt for the amount. This arrangement was entered into without the knowledge of, or any communication with, the plaintiff's attorney, who still went on with the cause, and carried the record down to the last Assizes at *York*, and consented to take a verdict for the plaintiff, damages one shilling, which was entered accordingly.

The plaintiff may compromise an action with the defendant without consulting his attorney; and, if the latter afterwards proceed in the action, in order to secure his costs, he is bound to make out a clear case of collusion between the plaintiff and defendant to deprive him of such costs.

Mr. Serjeant *Wilde*, on the second day of this Term, obtained a rule *nisi* that this verdict might be set aside,

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and all further proceedings in the action stayed, and that the plaintiff's attorney might pay all costs incurred in taking the cause down to trial, and also the costs of this application. The learned Serjeant produced affidavits which stated, that, previously to the Assizes, the defendant's attorney had informed the plaintiff's attorney, that the cause had been settled according to an arrangement entered into between the plaintiff and defendant, and that, if the plaintiff's attorney proceeded to trial and obtained a verdict for the plaintiff, an application would be made to the Court to set it aside. In *Chapman v. Haw* (a), it was held that a plaintiff may, without consulting his attorney, compromise an action with the defendant, and take upon himself the payment of the costs to the attorney, if there be no fraud or collusion to deprive the attorney of his costs. So, here, although the plaintiff's attorney might have had a lien for his costs, he ought not to have proceeded further in the action, after he had been informed by the defendant's attorney that there had been a *bond fide* settlement of the cause between the plaintiff and the defendant.

Mr. Serjeant *E. Lawes* afterwards shewed cause, on affidavits by the plaintiff's attorney and others, which stated that they believed the plaintiff and defendant had colluded together and come to the above arrangement with a view to deprive the plaintiff's attorney of his costs. The learned Serjeant therefore submitted that the attorney was warranted in proceeding to trial, in order to secure his costs; and he referred to the case of *Swain v. Senate* (a), where, it appearing that the plaintiff had colluded with the defendant's bail and his attorney, to deprive the plaintiff's attorney of his costs, by settling a debt, and accepting a part payment, without the intervention or knowledge of the plaintiff's attorney, the Court refused to re-

(a) 1 Taunt. 341.

(b) 2 New Rep. 99.

strain the latter from proceeding against the bail, in order to recover his costs.

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The Court desired the affidavits on both sides to be handed up, and having taken time to look into them—

Lord Chief Justice TINDAL, now said—*Prima facie*, it is competent to the parties to a suit to settle it between themselves, without the intervention of their attorneys. But, if the plaintiff's attorney proceeds in the action, with a view to secure his costs, he is bound to make out a clear case of collusion between the plaintiff and the defendant to deprive him of such costs. Upon reading the affidavits in answer to the application in this case, it does not appear to us that such collusion has been sufficiently established, although there is evidently a strong ground for suspicion. We therefore think the justice of the case will be best answered, by making the rule for staying the proceedings—

Absolute, without costs (a).

(a) See Tidd's Practice, Vol. 1, 9th Edit. 338, where all the authorities on this point are collected.

BEAVAN v. DAWSON, Esquire, Sheriff of *Bedfordshire*.

Friday,
May 21st.

THIS was an action of trespass, brought against the defendant, as Sheriff of the county of *Bedford*, for seizing the plaintiff's goods. The circumstances were as follow:—

The Sheriff seized, under an execution sued out by a judgment creditor against J. S., goods which had been

previously conveyed by the latter to the plaintiff by bill of sale, of which the Sheriff had notice. The plaintiff and J. S. having both refused to indemnify the Sheriff, although he offered to give up the possession of the goods to the plaintiff and return *nulla bona*, and the plaintiff brought trespass against the Sheriff for seizing his goods, the Court ordered the proceedings to be stayed until he was indemnified by the plaintiff, without imposing on the Sheriff the payment of costs.

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The plaintiff having advanced a large sum of money to Colonel *Latour*, he, on the 18th of *November*, 1829, executed a bill of sale, by which he conveyed all his goods and effects to the plaintiff, who took possession on the 14th, and the instrument contained a condition that the sale should not take place later than the 1st *February*, 1830, and on that day, the plaintiff, at the solicitation of the Colonel, agreed to postpone the sale until the 1st of *March* following. On the evening of the 22nd of *April*, the goods, which were still in the possession of the plaintiff's bailiff, were seized by the defendant under a writ of *fiery facias*, sued out at the suit of Messrs. *Antrobus*, who had obtained a judgment against *Latour*, although the defendant had previous notice of the bill of sale to the plaintiff:—but *Antrobus's* attorney wrote a letter to the under-sheriff, in which the writ was inclosed, and informed him that although Colonel *Latour* had executed a bill of sale to the plaintiff, yet that he should seize the goods under the writ, in order to obtain a priority, and prevent a sale by the Sheriff, and the attorney directed the under-sheriff not to sell immediately, as he did not wish to depreciate the property. The defendant, as sheriff, after he had made the seizure, applied to Messrs. *Antrobus's* attorney for an indemnity, before he proceeded to sell the goods, which was refused; he then applied to the plaintiff, and offered to relinquish the possession of the goods, and return *nulla bona*, if the plaintiff would indemnify him, which he also refused to do, and commenced the present action.

Mr. Serjeant *Wilde* on a former day in this Term, obtained a rule calling upon the plaintiff to shew cause why all further proceedings in the action should not be stayed until the sheriff should have been indemnified by the plaintiff, or security given to the satisfaction of the Prothonotary in case the defendant should return *nulla bona*, and restore the possession of the goods to the plaintiff. In

Probinia v. Roberts (a), an action having been brought against the Sheriff by the assignees of a bankrupt, for taking goods after the bankruptcy, on a writ issued out of this Court, and time had been given to return the writ; the Court of *King's Bench* ordered the proceedings to be stayed, until an indemnity was given to the Sheriff, on the terms of paying over to the assignees the money levied, and the costs of the action against the Sheriff; and in *Butts v. Smith* (b), where a person brought an action to recover a ship, the proceedings were suspended for three years, until an indemnity was given to the Sheriff.

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Mr. Serjeant *Taddy* now shewed cause.—In *Probinia v. Roberts*, the action was brought against the Sheriff by the assignees of a bankrupt, for having levied upon the bankrupt's goods after the bankruptcy. So, in *King v. Bridges* (c), where the Sheriff took the goods of a person in execution under a *fi. fa.*, who became bankrupt after the seizure, and before the sale, and the assignees gave the Sheriff due notice of the bankruptcy, and at the same time required him not to sell, and the Sheriff having applied to the party who sued out the execution for an indemnity for proceeding to sale, as well as to the assignees for returning *nulla bona*; it was held, that, on refusal of such indemnity by both parties, he was justified in selling the goods, and the Court ordered all further proceedings to be stayed until the Sheriff was indemnified to the satisfaction of the Prothonotary. In both these cases the Sheriff was placed under a difficulty by the operation of the law, as the property of the bankrupt passed to his assignees by relation to the act of bankruptcy, and the Sheriff could not have known at what period the act of bankruptcy took place. But here, the plaintiff was not only in the actual

(a) 1 Chit. Rep. 577.

(b) *Id.* 578, n.

(c) 1 B. Moore, 43; S. C. 7. Taunt. 294.

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possession of the goods for more than four months before the seizure, but the Sheriff had notice of the bill of sale, and was desired by the attorney of the execution creditor not to sell immediately, as it might have the effect of depreciating the value of the goods. Although in *Mac-George v. Birch* (a), where the assignees of a bankrupt claimed goods taken in execution, and the assignees and the plaintiff in the execution both refused to indemnify the Sheriff, the Court ordered, that, upon the delivery of the goods to the assignees, they should be compelled to indemnify the Sheriff, yet they said that the Sheriff's right to poundage would depend upon the question, whether the execution was warranted; and, if the assignees succeeded in the action, the Sheriff would be a wrong doer, and not entitled to poundage. The distinction is, where a bankruptcy intervenes between the seizure and sale; and here, as the Sheriff knew that the goods were the property of the plaintiff under the bill of sale, previously to the seizure, he cannot require an indemnity from the plaintiff, but only from the party for whom he acted; and in *Probinia v. Roberts*, the Court indemnified the Sheriff, upon the terms of his paying the assignees the costs of the action up to the time of the application, and the money levied under the writ: and here the application is not even made upon payment of costs by the Sheriff, although he comes to ask a favour of the Court.

Lord Chief Justice TINDAL.—It seems to me that this case falls within the general principle, that the Sheriff is not, at his own expense, to fight the cause, or try the rights of two contending parties. The proceedings, therefore, must be stayed until an indemnity has been given; and, as the plaintiff refused to indemnify the Sheriff, although he offered to return *nulla bona*, and give up the possession of the goods, I think the rule ought to be

(a) 4 Taunt. 585.

made absolute without imposing on the Sheriff the payment of costs.

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DAWSON.

The rest of the Court concurring—

Rule absolute.

ROE, on the Demise of DURANT, v. DOE.

THIS was an action of ejectment. A rule was obtained by Mr. Serjeant *Wilde*, on a former day in this Term, under the statute 1 Geo. 4, c. 87, s. 1, calling on *Thomas Moore*, the tenant in possession, to shew cause, why, upon his being admitted defendant, besides entering into the common rule, and giving the common undertaking, he should not undertake, in case a verdict should pass for the plaintiff, to give the plaintiff a judgment to be entered up against the real defendant, of the term next preceding the time of trial; and also, why he should not enter into a recognizance, by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which should be recovered by the plaintiff in this action.

The motion was founded on affidavits, which stated that the premises sought to be recovered by this action, had, in the year 1824, been demised to *Moore*, the tenant in possession, under a lease or agreement in writing, which had been duly executed, and which the lessor of the plaintiff was ready to produce to the Court; that *Moore's* interest in the term had been duly determined by a regular notice to quit, and which had been served personally on *Moore*; and that possession had been lawfully demanded, and that he had also been served with a copy of a declaration in this action on the 25th of *April* last.

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In shewing cause against a rule nisi in ejectment, under the statute 1 Geo. 4, c. 87, calling on the tenant to undertake, in case a verdict should pass for the plaintiff, to give him judgment of the term next preceding the time of trial, and to enter into a recognizance for the costs; an affidavit of the tenant was produced, which stated, that, on the 28th September, he received a notice to quit on the 25th March following, and that the plaintiff's steward had afterwards agreed, by parol, to relet him the premises, and that he had held them under such parol agreement:—
Held, first, that the notice to quit, being for a

customary year, was sufficient; and *secondly*, that the affidavit by the tenant was not sufficiently precise, as he should have stated for what period, or on what terms, he retook the premises under the parol agreement.

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DOE

Mr. Serjeant *Cross* now shewed cause, on an affidavit of *Moore*, which stated, that he had held the premises under the lessor of the plaintiff, as a tenant from year to year, for several years past; that, on the 28th *September*, 1828, he received a notice to quit on the 25th *March*, 1829; that, some time after the service of the notice, he saw the steward of the lessor of the plaintiff, who agreed by parol to re-let him the premises, and that he, the tenant, had rented and held them under such parol agreement, from the 25th *March*, 1829, to the present time; and that he was advised by his attorney, that there was a valid tenancy now subsisting, and that he had a good defence to the action. The learned Serjeant submitted, that, under these circumstances, the notice to quit was insufficient, as there was not a full half year between the 28th day of *September*, and the 25th *March* following, and that, at all events, the case was taken out of the statute by the subsequent parol agreement between the tenant and the steward of the lessor of the plaintiff.

Mr. Serjeant *Wilde* in support of his rule.—The statute 1 *Geo.* 4, c. 87, after reciting that the laws theretofore made for preventing the losses to which landlords were frequently exposed, by the unlawful holding over of lands and tenements by tenants, or persons claiming under them, after the expiration or legal determination of their terms or interests, had been found by experience insufficient, and it was therefore expedient to provide in certain cases a more expeditious mode for recovering the possession of lands and tenements so held over; it was enacted, that a landlord bringing an action of ejectment, may give notice to his tenant to appear in term, and then, on the production of the lease or agreement, to move, on affidavit, for a rule calling on the tenant to shew cause why he should not enter into certain undertakings, and enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which shall be in-

curred by the plaintiff in the action. The affidavit on which the present application is founded, is drawn up in the terms of the statute, which has been strictly complied with; and, although the tenant means to set up a new term, and has sworn that he holds under a new parol agreement, yet he should have stated the nature of the agreement with accuracy and precision; and if he holds under a new and existing demise, he would have a good defence upon the merits; whereas, he has merely sworn he has been advised that he has a good defence to the action.

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Lord Chief Justice TINDAL.—The notice to quit was for a customary half year, *viz.* from *Michaelmas* to *Lady-day*. It was therefore sufficient. What the decision of the Court might have been, if the affidavit of the tenant had been more precise, I do not say; but, as he has merely sworn that he retook the premises by parol, without saying for what period, or on what terms, I think, in the absence of satisfactory evidence of a new taking, that the case is within the letter and spirit of the statute; for we should be satisfied that there was a substantial re-letting of the premises, as well as the conditions on which the tenant was to hold; and the letting might have been for a month only, or even for a shorter period.

The rest of the Court concurring—

Rule absolute (a).

(a) See Tidd's Practice, 9th ed. 1721, *et seq.* where all the cases to which this statute extends, are collected, and the mode of proceeding under it is pointed out.

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A rated parishioner having sued the churchwardens in trespass for turning him out of a vestry room:—
Held, that he had a right to inspect and take extracts from the parish books, without paying any costs to the person producing them.

NEWELL v. SIMPKIN and Others.

THIS was an action of trespass for an assault committed on the plaintiff, an inhabitant of the parish of *St. Giles in the Fields*, by the defendants, as churchwardens of that parish, for having turned the plaintiff out of the vestry-room, where the defendants had met for the purpose of making a rate for the relief of the poor.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule calling on the defendants to shew cause why they should not produce, and permit the plaintiff to inspect and take copies of certain minutes and proceedings entered in the parish books. The motion was founded on an affidavit of the plaintiff, which stated that he was an inhabitant of *St. Giles in the Fields*, and liable to be rated to the rates for the relief of the poor of that parish; that the books were in the custody of the defendants, as churchwardens; and that the plaintiff only wished to inspect them for the purpose of proceeding in this cause; and that he could not safely proceed to trial without such inspection.

Mr. Serjeant *Merewether*, on shewing cause, stated that the defendants were willing to grant the plaintiff the inspection he required, if he would pay the costs that might be incurred by producing the books, as well as the costs of the person who should attend to exhibit them.

Mr. Serjeant *Wilde*, in support of his rule, insisted that the plaintiff was entitled to inspect the books as a matter of right, and without the payment of any costs, and that the Court of *King's Bench* had lately ordered an inspection of parish books to a rated parishioner, in the case of *The King v. The Inhabitants of St Martin's in the Fields*,

without imposing any terms on the party making the application.

Lord Chief Justice *Tindal*, however, thought, that in that case the rule for the inspection of the books was made absolute, on the terms of the applicant's paying reasonable costs to the party producing them; and Mr. Justice *Park* was of opinion that such costs ought to be paid.

The Court thereupon directed the case to stand over, in order that the terms of the rule of the Court of *King's Bench*, in the case referred to, might be looked at, for the purpose of ascertaining whether such costs had been allowed; and, on Mr. Serjeant *Merewether* now stating that they had not, the rule was made absolute in the terms as prayed.

Rule absolute (a).

(a) See *May v. Gwynne*, 4 Barn. & Ald. 301, where the Court would not compel the vestry clerk of a parish to produce and permit copies to be taken of documents from the parish chest in his custody, for any other than parochial purposes. But, in the case of *The King v. The Guardians, Churchwardens, and Overseers of Great Farringdon*, (9 Barn. & Cress.

541), it was held, that a rated parishioner has a right to inspect the accounts of the expenditure of the parish monies, kept by guardians of the poor appointed under the statute 22 Geo. 2, c. 83:—and the Court of *King's Bench* granted a *mandamus* to the guardians, &c. commanding them to allow such inspection.

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NEWELL
v.
SIMPKIN.

1830.

*Saturday,
May 22nd.*

By a Judge's order, the defendant was required, within a limited time, to deliver to the plaintiff particulars of set off, and, in default thereof, the defendant was to be precluded from giving evidence in support of his set off at the trial. The defendant neglected to comply with the terms of the order, and the cause was afterwards referred, by an order of *Nisi Prius*; and after the arbitrator had proceeded with the reference, a Judge, during the Assizes, made an order for the delivery of the particulars of the defendant's set off:—*Held*, that he had no authority so to do under the statute 1 Geo. 4, c. 55, s. 5, as, after the order of reference, the cause was out of Court.

ASHWORTH v. HEATHCOTE, Esquire, M. P.

THIS cause came on to be tried at the last Summer Assizes for the county of *Stafford*, when it was, with another cause depending between the same parties, referred to a Barrister by an order of *Nisi Prius*, which was afterwards made a rule of Court. The arbitrator, by his award, after reciting—"That, by a certain order of *Nisi Prius* made at the Assizes holden at *Stafford*, in and for the county of *Stafford*, on the 6th of *August*, 1829, a certain cause wherein *John Ashworth* the elder, *John Ashworth* the younger, and *Thomas Ashworth*, were the plaintiffs, and *Richard Edensor Heathcote*, Esquire, was the defendant, was referred to *B. H. Malkin*, Esquire, to settle that cause and all matters in difference between the said parties, or any or either of them; and that also by a certain other order of *Nisi Prius*, made at the same Assizes, a certain cause wherein the said *Thomas Ashworth* was the plaintiff, and the said *Richard Edensor Heathcote*, was the defendant, was referred to the said *B. H. Malkin*, to settle that cause, and all matters in difference between the said parties therein; and that it was afterwards agreed, by and with the consent of the counsel for the said several parties, that the said several orders should be acted upon as parts of one and the same order; and that also, by a certain order made on the 24th *July*, 1829, in the said last-mentioned cause, by the Honourable Sir *Stephen Gascoke*, Knight, one of the Justices of the Court of *Common Pleas*, it was ordered, that the defendant's attorney or agent should, within four days, deliver to the plaintiff's attorney or agent, an account in writing, with dates, of the particulars of the defendant's set-off, and, in default thereof, that he should be precluded from giving evidence in support of such set-off at the trial of the cause, and that no such account was delivered within four days from the date of such order, or at any time before the said cause was called on for trial,

and the said last mentioned order of *Nisi Prius* was made therein; and that, after the making of the said last-mentioned order of *Nisi Prius*, and after the first meeting of the respective parties upon the said reference, but during the continuance of the said Assizes, that is to say, on the 10th day of *August*, in the year aforesaid, a certain order was made in the said last-mentioned cause by the Honourable Sir *John Vaughan*, one of the Judges of the said Assizes, whereby it was ordered that the defendant should be at liberty forthwith to deliver the particulars of set off in that cause, and that such particulars were accordingly delivered forthwith."

The arbitrator awarded, ordered, and adjudged, that a verdict should be entered for the plaintiffs in the said first-mentioned action, for the sum of 70*l.* 6*s.* 4*d.*, damages; and he also awarded and adjudged that the defendant in the said second-mentioned cause, was indebted to the plaintiff in the sum of 60*l.* 10*s.* 2*d.*, on the causes mentioned in the last seven counts of the declaration of the plaintiff; but that the plaintiff was indebted to the defendant in a larger amount on the causes mentioned in the particulars of set-off delivered as above mentioned; and the arbitrator awarded and directed, that, if the Court should be of opinion that the evidence of such set-off was receivable in the cause, then the verdict in the said last-mentioned cause should be entered generally for the defendant; but, if the Court should be of opinion that the evidence of such set-off was not receivable in the said cause, but only as a matter in difference between the parties, then the verdict in the last-mentioned cause should be entered for the plaintiff, upon the said last seven counts of his declaration, for the sum of 60*l.* 10*s.* 2*d.* damages, and for the defendant upon the other counts of the declaration:— And further, that the plaintiff should in no case be entitled to receive the said sum of 60*l.* 10*s.* 2*d.* of and from the defendant; nor the defendant to receive any sum from

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the plaintiff on account of the said set-off; but that the account between them should be considered as finally closed and balanced, except as far as regarded any payments to be made under and by virtue of that award. And, lastly, the arbitrator awarded, ordered, and directed, that each of the parties should bear and pay his and their own costs of the reference.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule, calling on the defendant to shew cause why a verdict should not be entered for the plaintiff, in the cause of *Ashworth v. Heathcote*, for the sum of 60*l.* 10*s.* 2*d.*, according to the said award. The learned Serjeant submitted, that the defendant, by not having complied with the terms of the order made by Mr. Justice *Gaselee*, for the delivery of the particulars, was precluded from going into evidence in support of his set-off; and that the order of Mr. Baron *Vaughan*, having been made after the cause was referred by an order of *Nisi Prius*, and notwithstanding no particulars had been delivered under Mr. Justice *Gaselee's* order, was irregular; and the arbitrator has raised the question upon the face of the award, whether the evidence of set-off was admissible in the cause, or only as a matter of difference between the parties. If the defendant had gone before a Jury, he would have been precluded by the terms of the first order, from giving evidence in support of his set off; and, as the last order for the delivery of such particulars was made after the order of reference was drawn up, and the parties had proceeded upon it, such order was a nullity, as the learned Baron had no authority to make it.

Mr. Serjeant *Russell* now shewed cause.—The only point is, whether evidence of the defendant's set off was receivable in the cause before the arbitrator, and that will depend upon the question, whether the order of Mr.

Baron *Vaughan*, for the delivery of the particulars of the defendant's set off after the cause was referred, was a legal or valid order, or whether he had jurisdiction to make it. The statute 1 *Geo.* 4, c. 55, was passed for the purpose of giving certain powers to Justices of Assize, and the 5th section enacts, that Justices at *Nisi Prius* may make orders in causes to be tried before them, although they may not be Judges of the Court in which such actions are depending (a). Although the order was made after the cause was referred, yet, in the case of a reference by order of *Nisi Prius*, or by rule of Court, according to the statute, a party may apply for a rule to shew cause why his opponent should not attend before the arbitrator, or why the

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(a) That section, after reciting that it is expedient that the Justices of the Courts of King's Bench and Common Pleas, and the Barons of the *Exchequer* at *Westminster*, and the Justices of *Chester*, should have power and authority, upon their respective circuits for taking the assizes, to grant summonses, and to make orders in actions and prosecutions, in the manner thereafter mentioned, enacts, "That, from and after the passing of the act, it shall and may be lawful for the Justices of the Courts of King's Bench and Common Pleas, and the Barons of the *Exchequer* at *Westminster*, and the Justices of *Chester*, and each and every or any of them, during their respective circuits for taking the assizes, to grant such and the like summonses, and make such and the like orders, in all actions and prosecutions which are or shall be depending in any of his Majesty's Courts of record at *Westminster*,

in which the issue, if brought to trial, would be to be tried upon such their respective circuits, as if such Justices of the Courts of King's Bench and Common Pleas, and Barons of the *Exchequer*, and Justices of *Chester*, were respectively Judges of the Court in which such actions or prosecutions are or shall be depending; although such respective Justices of the Courts of King's Bench and Common Pleas, and Barons of the *Exchequer*, and Justices of *Chester*, or any of them, may not be Judges of the Court in which such actions or prosecutions are or shall be depending, and such summonses and orders shall be of the same force and effect as if such Justices of the Courts of King's Bench and Common Pleas, and Barons of the *Exchequer* at *Westminster*, and Justices of *Chester*, were respectively Judges of the Court in which such actions or prosecutions are or shall be depending."

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latter should not be directed to make his award without waiting for such attendance; for, in *Hetley v. Hetley* (a), where a difference subsisted as to the adjustment of a long train of accounts, almost every item of which was contested, and the matter was subsequently made the subject of a reference, and one of the parties neglected to carry in his vouchers before the time originally limited to the arbitrator for making his award, and the time having been repeatedly enlarged in order to afford him an opportunity of doing so;—the other party at last applied to the Court, on affidavit, stating the circumstances of the case, for a rule to shew cause why the party neglecting should not produce his vouchers before a certain day, and why the time for making the award should not be further enlarged, or why, on the party's still neglecting to attend, the arbitrator should not be directed to proceed, on hearing the other party alone—the Court granted the rule without hesitation; and the party, instead of shewing cause against it, peremptorily undertook to deliver in his vouchers within the specified time. Here, therefore, the cause was not out of Court by the order of reference; and it is quite clear that such an order may be amended either by the Court, or by a Judge; for, in *Evans v. Senor* (b), the Court directed an order of reference at *Nisi Prius*, made a rule of Court, to be amended by inserting certain matters which had been omitted, they being incident to the substance of the agreement between the parties; and Lord Chief Justice Gibbs said:—"The Court are in possession of the order, by its having been made a rule of the Court." So, in *Grimstone v. Bell* (c), where a cause was referred by an order of *Nisi Prius*, and the submission, which was drawn up in the usual terms, contained, amongst others, that of filing no bill in equity, and it was necessary for the defendant that a bill

(a) Exch. M. T. 1789, cited in
Kyd on Awards, 101; Caldwell
on Arbitration, 46.

(b) 5 Taunt. 662.

(c) 4 Taunt. 254.

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should be filed, in order to obtain a discovery of certain facts material to his defence, the Court allowed the order of *Nisi Prius*, and rule of Court made in pursuance thereof, to be amended by striking out the words "and also consenting not to bring any writ of error, or file any bill in equity." Here the order for the delivery of the particulars of the defendant's set-off was made to meet the justice of the case, and it could not operate beyond an amendment of the order of reference. The arbitrator, therefore, had a right to take the subject matter of the set-off into his consideration, as a matter in difference between the parties; and there is consequently no ground for this application.

Mr. Serjeant *Wilde*, in support of his rule.—The question is, not whether the order of reference may be amended, but whether a Judge at the Assizes has power to alter the situation of the parties to a suit, after the cause has been referred by an order of *Nisi Prius*. It is quite clear he has not; for, after the order of reference, he was *functus officio*; and as the defendant had neglected to deliver the particulars of his set-off, as required by the former order, he was precluded from giving evidence in support of it, in case he had appeared in Court and defended the cause at the trial. The arbitrator therefore ought not to have received them in evidence. In *Evans v. Senor*, and *Grimstone v. Bell*, the orders of reference were amended, to give effect to the intent and meaning of the parties. In the former case, Lord Chief Justice *Gibbs* said—"The Court cannot add any thing which requires the consent of the parties, but they can add that which the parties, in the legal effect of their contract, assented to." And in the latter, Sir *James Mansfield* said:—"Neither is this the sort of bill in equity which the rule of Court contemplates, and which means a bill filed to postpone the payment of a debt, or for other purposes of vexatious delay."

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Lord Chief Justice TINDAL.—The question in this case is reducible to a very simple point. There was a reference of this cause by an order of *Nisi Prius*—that is, of the cause as it then stood; and it must be assumed from the terms of the order of my brother *Gaselee*, although it does not appear on the face of the award, that the defendant had pleaded the general issue, and given a notice of set-off; but as he did not comply with that order, by delivering the particulars of his set-off within the time limited, he was precluded from giving evidence in support of such set-off at the trial. The cause, therefore, went down virtually on the general issue. But, after the order of reference, and the first meeting had been had before the arbitrator, my brother *Vaughan* made an order that the defendant should be at liberty to deliver the particulars of his set-off, and such particulars were delivered accordingly. Now, if the defendant were precluded from giving evidence of his set-off at the trial, by his own refusal or neglect to deliver the particulars as required by the former order, he ought not to be allowed to produce or give them in evidence before the arbitrator; for the plaintiff might not have agreed to refer the cause, if he had supposed that the defendant might resort to the particulars of his set-off. It therefore appears to me, that the learned Baron exceeded his power by ordering such particulars to be delivered; and if this rule be made absolute, no injustice will be done, as the defendant will stand in the same situation as if the cause had gone before the Jury, as he would then have been precluded from giving any evidence in support of his set-off, by his own negligence or default.

Mr. Justice PARK.—I am of the same opinion. Although, by the 1 Geo. 4, c. 55, s. 5, Justices of the Courts of *Westminster Hall* may, during their circuits for taking the assizes, make such orders in all actions which are or shall be depending in any Court of record at *Westminster*, in which the issue, if *brought to trial*, would be to be tried

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upon such their respective circuits, as if such Justices of the Courts above, were respectively Judges of the Court in which such actions are or shall be depending, although such Justices of the Courts above may not be Judges of the Court in which such actions are or shall be depending; yet, it does not authorize or empower a Judge at the Assizes to make an order after the cause has been referred. The words of the act are confined to actions in which *the issue is brought to trial* before the Judges at *Nisi Prius*; and here, if the plaintiff had conceived that the defendant might produce the particulars of his set-off before the arbitrator, he might have refused to consent to the reference, as the defendant was precluded from giving them in evidence at the trial, through his own default. Although an order of reference may, in some instances, be amended, yet, in *Rawtree v. King* (a), where all matters in difference *in the cause* were agreed to be referred, and the associate by mistake drew up the order of reference generally, as to all matters in difference between the parties, the Court would not allow it to be amended, but directed a new trial.

Mr. Justice GASELEE.—The defendant, by neglecting to attend to the terms of my order for the delivery of the particulars of his set-off, precluded himself from giving evidence in support of such set-off in case the cause had gone before a Jury. He must, therefore, be considered as standing in the same situation before an arbitrator; and I concur with the Court in thinking that my brother *Vaughan* was not authorized in making an order for the delivery of the particulars of the set-off, after the order of reference, and a meeting had actually taken place before the arbitrator.

Mr. Justice BOSANQUET concurring—

Rule absolute.

(a) 5 B. Moore, 167.

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May 24th.*

Devise to two trustees and the survivor of them, or the executors or administrators of such, of all the testator's freehold messuages, and also all his stock or shares in the funds, and all money in hand and debts due to him, and all shares or property whereof he might be possessed or entitled to, upon trust for testator's wife and children; the freehold to be sold, and an equal division to be made among the children and their heirs after the death of the wife, and all the children had attained the age of twenty-one. The testator afterwards made a codicil, by which he directed his copyhold estate to be transferred to his wife until the expiration of the leases, and after that time, as soon as convenient, or within one year, to be sold for the benefit of the children and their heirs, as directed in the will:—*Held,*

first, that the copyhold estate did not pass to the trustees by the will or codicil; and *secondly*, that the interest of the wife in such estate determined on the expiration of the leases.

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THIS was an action of replevin for taking and detaining the plaintiff's goods in a dwelling-house, situate in the parish of *St. Mary, Islington*, in the county of *Middlesex*. The defendant pleaded several cognizances, *viz.* *First*, as bailiff of *John Hodsoll*, under a distress for 126*l.* for three years' rent due on the 25th *March*, 1828, under a demise at the yearly rent of 42*l.*, payable quarterly. *Secondly*, the like for 42*l.* for one year's rent due to *John Hodsoll* on the 25th *March*, 1828. *Thirdly*, the like cognizance as bailiff of *John Burton*, for 126*l.* for three years' rent due on the 25th *March*, 1828, under a demise at the yearly rent of 42*l.*, payable quarterly; and *fourthly*, the like cognizance for 42*l.* for one year's rent due to *John Burton* on the 25th *March*, 1828. Pleas in bar.—*First*, that the plaintiff did not hold or enjoy the premises as tenant to the said *John Hodsoll*, or the said *John Burton*, as in the several cognizances above alleged; and *secondly*, that no rent was in arrear.

Upon the trial of the cause before Lord Chief Justice *Tindal*, a verdict was taken for the plaintiff for four guineas, with liberty to enter a verdict for the defendant for 126*l.* the rent distrained for, subject to the opinion of the Court upon the following case.

The premises in question, a dwelling-house in the parish of *St. Mary, Islington*, were copyhold, holden of the manor of *Barnesbury*. *Thomas Lambe* being seised thereof according to the custom of the manor, and having surrendered the same (amongst other copyhold premises held of the same manor,) to the uses of his will, and being also seised of several freehold estates, by his will, bearing date the 21st *June*, 1804, duly executed and attested to pass

real estates, gave and devised (among other things) as follows:

“ I give and devise unto *John Hodson*, of *Carey Street, Lincoln's Inn*, Esquire, and *Joseph Boucock* of the *Old Bailey*, stone-mason, and the survivor of them, or the executors or administrators of such, all those my three freehold messuages in *Furnival's Inn Court, Holborn*, and also all my stock or shares in any of the public funds, and all money in hand, or debts due to me, to be placed in the *Three per cent. Consols Bank of England*; and all shares or property whereof I may be possessed or entitled to, upon this special trust and confidence, that they my said trustees shall and do permit and suffer my wife, *Maria Dore Lambe*, to receive and take, for and during the term of her natural life, all rents and profits of the said messuages and all other freeholds or leaseholds that I may be possessed of, and the entire dividends and proceeds of the said stock or shares in the *Bank of England*, except the presents hereinafter mentioned, for the support and maintenance of herself and all my legitimate issue, which I now have, or may hereafter have by her, except as follows: that is to say, in case my reputed son, known by the name of *Thomas Lambe*, shall live to attain the age of twenty-one years, I will and direct that they, my said trustees, shall and do with all convenient speed, transfer and assign over to him 200*l.* stock of the *Three per cent. Consols* of the *Bank of England*, part of my stock or share therein, and to have no other claim on my property whatsoever, but to be in full of all bequests from me to him; and I do hereby further will and direct my said trustees to assign and transfer unto each and every of my lawful children, the like sum of 400*l.* *Three per cent. Consols*, part of my stock or share therein, when and so soon as they shall respectively attain their respective ages of twenty-one years; and from and after the decease of my said wife, and all my children have attained the age of twenty-one years, I will and direct that my said trustees, or the survivor of them, or the

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executors or administrators of such survivor, do and shall make an equal division among and between all my said children and their heirs, of my said three freehold messuages, either by sale or otherwise, as may be deemed most conducive to the interest of my said children; and also do and shall in like manner transfer over unto my said children, all the remaining part of my stock or share in the Three *per cent.* Consols Bank of *England*, and all stock or shares, *my property*, estate, and effects, and to divide the same in equal shares and proportions among and between all my said children and their heirs." And the testator thereby appointed the said *John Hodson* and *Joseph Boucock*, and his widow *Maria Dove Lambe*, executors and executrix of his will.

The testator afterwards made the following codicil: "I, *Thomas Lambe*, do hereby will and direct that my copyhold estate in *Church Street, Islington*, be transferred to my beloved wife, *Maria Dove Lambe*, until the expiration of the leases; and after that time, as soon as convenient, or within one year, to be sold by public auction, the money to be placed in the Three *per cent.* Bank of *England* stock, for the benefit of my children and their heirs, as directed in the will. If it should please God to call her before that time of the expiration of the leases, the copyhold to be sold by public auction, as soon as convenient, and the money placed as above directed.—N. B. If there should not be money sufficient in my possession, at the time of my decease, to pay the fine of the copyhold, proving the will, and funeral expenses, my executors to sell out of the Three *per cent.* Consols, 600*l.* or a smaller sum, as may be required. Witness my hand,
Thomas Lambe."

The testator died, without having altered or revoked his will or codicil, on the 11th *May*, 1806, seised of the copyhold in question. He left his wife, the said *Maria Dove Lambe*, and three lawful children by her, surviving himself, *viz.* *Joseph Lambe*, *Maria Dove Lambe* the young-

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er, and *Harriett Lambe*. The will and codicil were proved by the widow and the said *John Hodsohl* and *Joseph Boucock*, in the Prerogative Court of *Canterbury*, on the 23rd *May*, 1806. On the 11th *July*, 1806, the said *John Hodsohl* and *Joseph Boucock*, were admitted tenants of the premises in question, on the Court rolls of the manor, as devisees in fee, at the will of the lord, pursuant to the will and codicil of the testator, and upon the trusts therein mentioned. The admission stated the testator's surrender to the use of his will, his devise to *Hodsohl* and *Boucock*, of "all his property whereof he might be possessed or entitled to," upon certain trusts in the will and codicil particularly mentioned, and described the copyhold tenements, of which the lord of the manor by his steward did deliver seisin by the rod, according to the custom of the manor, to hold the said premises, with the appurtenances, unto the said *Hodsohl* and *Boucock*, and *their heirs*, pursuant to the said will, of the lord of the manor, by the rod, &c.

The said *Maria Dove Lambe*, the widow, on the 12th of *August*, 1807, intermarried with *John Burton*, one of the persons under whom the defendant made cognizance, and she died on the 23rd *November*, 1823, without having had issue by the said *John Burton*. The three legitimate children of the testator all died in the life-time of their mother under the age of twenty-one years, unmarried and without issue. Letters of administration of the personal estate of the said Mrs. *Burton*, and of the testator's said three infant children, were granted by the Prerogative Court of the Archbishop of *Canterbury* to the said *John Burton*, at the times following, *viz.* of the personal estate of the said Mrs. *Burton*, on the 3rd of *February*, 1824, and of the said *Joseph Lambe*, *Maria Dove Lambe* the younger, and *Harriett Lamb*, on the 9th of *February*, 1824. The said *Joseph Boucock* died on the 5th *February*, 1825, leaving the said *John Hodsohl*, who was the other person under whom the defendant made cognizance, him surviving. The lease mentioned in the will of the premises

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in question, expired on the 25th of *December*, 1821. The plaintiff was let into possession by Mrs. *Burton* in *October*, 1823, to hold from *Michaelmas* preceding, at the yearly rent of 42*l.*, payable quarterly; and he remained in possession from that time up to the time of the distress.

The question for the opinion of the Court was, whether, upon the facts stated, the defendant was entitled to a verdict upon any or either of the cognizances before mentioned. If the Court should be of opinion that the defendant was entitled to a verdict under either of the said cognizances, then a verdict was to be entered for him for such sum as the Court should direct, and the value of the goods distrained to be taken as of the value equal to the rent in arrear. But if the Court should be of opinion that the defendant was not entitled to a verdict upon either of the cognizances, then the verdict for the plaintiff was to stand.

The case was twice argued;—first, in the last *Trinity* Term by Mr. Serjeant *Wilde*, for the plaintiff, and Mr. Serjeant *Lawes*, for the defendant. The Court took time to consider; and in the last *Michaelmas* Term Lord Chief Justice *Tindal* said, that there was a difference of opinion on the Bench, and he therefore directed the case to be re-argued (*a*).

(*a*) On the first argument, the cases of *Doe d. Player v. Nicholls*, 1 Barn. & Cress. 336; *S. C.* 2 Dow. & Ryl. 480; *Doe d. Woodcock v. Barthrop*, 5 Taunt. 382; *S. C.* 1 Marsh, 90; *Doe d. Budden v. Harris*, 2 Dow. & Ryl. 36; *Morrant v. Gough*, 1 Man. & Ryl. 41; *S. C.* 7 Barn. & Cress. 206; *Trent v. Hanning*, 1 New Rep. 116; *Holder d. Sulyard v. Preston*, 2 Wils. 400; *Sugden on Powers*, 3rd edit. 106; *Coke Littleton*, sect. 169; and *Bentham v. Wiltshire*, 4 Madd. 44, were cited for the plaintiff, to shew that if the trustees took any

interest under the will and codicil, they only took for the purposes of carrying the trusts into execution; and that the general rule, deducible from those authorities, is, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer; and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it:—and in this case there were no words in the will and codicil which gave the trustees any estate beyond the

A second argument accordingly took place on a former day in this term, by Mr. Serjeant *Scriven*, for the plaintiff, and Mr. Serjeant *Taddy*, for the defendant.

For the plaintiff it was insisted, that neither of the cognizances could be sustained;—*first*, because the copyhold estate did not pass to the trustees under the will;—and *secondly*, that the interest in such estate, which passed to the testator's widow under the codicil, was determined on the expiration of the lease of the premises in question, on the 25th *December*, 1821, or, at all events, on her death, in *November*, 1823. *First*, The testator did not make any disposition of his copyhold estate by his will. He devised to two persons therein named, and the survivor, “all those his three freehold messuages in *Furnival's Inn Court, Holborn*, and also all his stock or shares in any of the public funds, and all money in hand, or debts due to him, and all

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time during which the trust was to be performed.

For the defendant, the cases of *Doe d. Wall v. Langlands*, 14 East, 370; *Roe d. Shell v. Pattinson*, 16 East, 221; *Doe d. Morgan v. Morgan*, 6 Barn. & Cress. 512; 5 C. 9 Dowl. & Ryl. 633; *Nicholls v. Butcher*, 18 Ves. 193; and *Noel v. Hoy*, 5 Madd. 38, were cited, to shew that the testator's real and copyhold estates passed to the trustees under the word *property* in the will. The cases of *Jenkins d. Jenkins v. Jenkins*, Willes, 650; *Harton v. Harton*, 7 Term Rep. 652; and *Fletcher v. Simton*, 2 Term Rep. 656, were cited, to shew that the trustees took a legal estate in fee in the real and copyhold estates, under the will and codicil; and *Bacon's Abridgment*, tit. “*Leases I.*,” was referred to as establishing the principle, that, al-

though a tenant for life cannot make leases to continue longer than his own life, yet, if he make a lease for twenty years generally, and afterwards he in the reversion confirms that lease, and then the tenant for life dies, although this at first would have determined by the death of the lessor, yet the confirmation made it good, and unavoidable for the whole term. But if the lease had been for twenty years, if the lessor, tenant for life, should so long live; there, if the reversioner had confirmed the lease, yet it would not prevent its voidance upon the death of the tenant for life; and in *Jenner v. Morgan*, 1 Peere Wms. 392, where a tenant for life leased for years, rendering rent half yearly, and died in the middle of the year, a Court of equity refused to apportion the rent, as to time.

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shares or *property* whereof he might be possessed or entitled to." Admitting, that the word 'property' has in several cases been held to be sufficient of itself to pass a real or copyhold estate, yet it must appear from other parts of the will, to be the clear intention of the testator that it should be applied to such estate. Here, however, the rule of construction is pointed out by the will itself; for the word *property* is preceded by and coupled with the word *shares*, which applies to the testator's stock or shares in the funds, which, *ex vi termini*, relate to personalty. It is a well-known and long-established proposition, that where a person is possessed of freehold and leasehold property, the leasehold will not pass by a general devise applicable to freeholds, unless an intention to include leaseholds under those words can be collected from the face of the will, or from the nature or situation of the leaseholds themselves. It was therefore resolved, in *Rose v. Bartlett* (a), that if a man hath lands in fee, and lands for years, and devises all his lands and tenements, the fee-simple lands pass only, and not the lease for years. And if a man hath a lease for years, and no fee-simple, and deviseth all his lands and tenements, the lease for years passes; for otherwise the will would be merely void. This proposition has prevailed from the time it was established, to the case of *Thompson v. Lady Lawley* (b), where it was considered to be a rule not to be shaken; and it was consequently held, that, under a general devise of all manors, messuages, lands, tenements, and hereditaments, leaseholds did not pass, unless there were something to shew an evident intention of the devisor that they should pass. Here, so far from any intent of the testator to pass real property of any kind under the word property, the contrary expressly appears; for, having first disposed of his freehold messuages in *Furnival's Inn Court*, he proceeds to his personalty, *viz.* his stock or shares in

(a) Cro. Car. 292.

(b) 2 Bos. & Pul. 303; S. C. 5 Ves. 476.

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the funds, and all money in hand, or debts due to him, and all shares or property whereof he might be possessed or entitled to, clearly meaning property *ejusdem generis* with his stock or shares in the funds. But the codicil removes all doubt, as it shews that the testator did not mean to alter any of the dispositions in his will, but to supply an omission discovered subsequently as to his copyhold estate, which he directs to be transferred to his wife, until the expiration of certain leases; and, as the trustees are not named, or even referred to in the codicil, they took nothing under it; and it does not appear when it was executed, as it has no date; it might, therefore, have been made shortly after the execution of the will. The testator clearly meant that his wife should have the legal and equitable possession of the copyhold till the expiration of the leases; and she might have been admitted during her life-time, for the tenant may compel the lord to admit him for a limited period or interest, as for a term of years, or for life; and the estate was expressly directed *to be transferred* to her until the expiration of the leases. It is also a well-known and established principle, that any generality of expression in a will or codicil, may be limited or controlled by any particularity of intention made apparent in other parts of such instruments; as in *Timewell v. Perkins*(a), where the testator explained his own meaning of the word *estate*, by expressly confining it to personal, as ready money, plate, &c. &c. In *Roe d. Helling v. Yeud* (b), the testator, after directing his debts to be paid by his executors, and making several bequests of annuities and money, gave to his five grandchildren, whom he appointed his executors, as follows:—"all the remainder of my property whatsoever, to be divided equally, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, and demands, or any I may hereafter

(a) 2 Atk. 102.

(b) 2 New Rep. 214.

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make by codicil to this my will; all my goods, stock, bills, bonds, book debts, securities, and funded property;" it was held, that the testator's real estate did not pass under the residuary clause, there being no provision throughout the will that appeared to have any relation to real estate; and the intention of the testator being doubtful, the Court determined that the title of the heir should prevail. In *Doe d. Hurrell v. Hurrell* (a), it was held, that the words, 'rest and residue of the testator's estate and effects,' did not extend to real estates, from the apparent intention manifested by the testator of not extending the word effects to real estates. In *Newland v. Marjoribanks* (b), the testator devised all the rest, residue, and remainder of his estate, of whatsoever nature or kind the same might be; and Sir *James Mansfield* said—"That there was no doubt that the words, 'of what nature or kind soever,' would comprehend realty; yet, he thought on consideration, that the testator did not mean to include his real estate, for that the import of words might be restrained or extended by the context." In *Doe d. Bunny v. Rout* (c), a bequest of all the testatrix's stock in trade, household goods, wearing apparel, ready money, securities for money, *and every other thing her property*, of what nature or kind soever, to her sister, to and for her own proper use and disposal, was held not to pass land, it being controlled by indications which rendered the testatrix's intent uncertain; although, if the intention to pass land had clearly appeared, the words would have been sufficient to carry it. In *Monk v. Mawdsley* (d), a *feme covert*, having power to dispose by will of personal property, and of a real estate at N., by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband her fields and house at N., likewise the remainder of her personalty, and

(a) 5 Barn. & Ald. 18.

(b) 5 Taunt. 268.

(c) 7 Taunt. 79.

(d) 1 Sim. 286.

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all she might die possessed of after payment of her debts, legacies, and funeral expenses; it was held, that the husband took a life estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. In *Woollam v. Kenworthy* (a), it was held, that, under the general word 'estate,' in a will, a real estate would pass, unless it were restrained by the intention of the testator, to be collected from the whole of his will; for, as the Lord Chancellor said (b)—“The question, whether the words, ‘all my estate and effects,’ will include a real estate or not, depends, *first*, upon the immediate context of the will; and, *secondly*, upon the general form and scheme of the will, as demonstrating the intention.” But supposing that in this case the copyhold estate was substantially disposed of by the testator in his codicil, and the trustees had been duly admitted as tenants, yet their legal interest would have ceased long since, as they would only have taken for a limited period, and for the mere purposes of carrying into execution the trusts of the will and codicil. It is quite clear that they did not take an estate in fee; for the testator, by his will, directed them to transfer a certain sum of 3 *per cent.* Consols to each of his children, *when* they should attain their respective ages of twenty-one; and he *lastly* directed them to make an equal division of his three freehold houses amongst his children, by sale or otherwise, after the decease of his wife, and *all* his children should have attained the age of twenty-one; and as all his children died in the life-time of their mother, under that age, it is clear that, on her death, there was an end of the trust, and the only remaining one is in the nature of a resulting trust, for the benefit of the heir-at-law, who is not before the Court. In *Doe d. Woodcock v. Barthrop* Mr. Justice *Heath*, in delivering the judgment of the

(a) 9 Ves. 137.

(b) Lord *Eldon*.

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Court, said (a)—“ It is a general rule that the legal estate in the trustees shall be carried only so far as is necessary to effectuate the several intentions of the will;” and in *Doe d. Player v. Nicholls*, Mr. Justice Bayley said (b)—“ It may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer; and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it. *Doe v. Simpson* (c), and *Doe v. Timins* (d), are authorities upon that point.” In *Hawker v. Hawker* (e), a testator devised all his real estates in several parishes to trustees, their heirs and assigns, for ever, upon trust to sell his estate at *H.* to pay his debts; and, in case it should not be sufficient, then, as to his estate at *F.*, upon trust to sell that also, to make good the deficiency; but, in case it should not be necessary, then, as to his estate at *F.*, and his other remaining estates, in trust, to receive the rents and profits till his daughter came of age, and then to pay such of the rents and profits as had not been applied to her maintenance and education, together with the surplus money arising from the sale of his estate at *F.*, if it should be sold, to his daughter, upon coming of age, and from that period to the use of the trustees for the life of his daughter, and after her death to the use of her children—and, by a codicil to his will, in which he made an alteration as to the trustees, the testator devised his estates to the new trustees therein named, and to the survivors and survivor of them, and the heirs of such survivor “ such estates as aforesaid, in trust as aforesaid.” It appeared that the

(a) 5 Taunt. 385; S. C. 1 Marsh. 95.

(b) 1 Barn. & Cress. 342; S. C. 2 Dow. & Ryl. 480.

(c) 5 East, 162.

(d) 1 Barn. & Ald. 530.

(e) 3 Barn. & Ald. 537.

estate at *H.*, when sold, was alone sufficient to pay the debts; and it was held that the trustees, and the survivors and survivor of them, and the heirs of the survivor, took only an estate for the life of the daughter in the remaining estates at *F.* and elsewhere. In *Doe d. Player v. Nicholls*, the testator devised to trustees, in trust for his only son, all his freehold and copyhold lands, *to be transferred* to him as soon as he should attain twenty-one years of age; and Mr. Justice *Bayley* said (*a*)—"The usual mode of transferring a copyhold estate is, that the person having the estate surrenders it to the lord, and suffers another person to be admitted as tenant on the rolls. If the trustees in this case took an estate in fee, it would be necessary for them to make an actual surrender of the estate, in order that it might pass from them to the surrenderee. If, however, the estate limited to them be determinable as soon as the object of the testator's bounty attain the age of twenty-one years, his admittance on the Court rolls would operate as a transfer of the estate. It would not then be necessary that there should be a transfer of any interest from the trustees to him, in consequence of the determination of the trust estate at that period, and his admittance would be sufficient to satisfy the words 'to be transferred;'" and Mr. Justice *Holroyd* said (*b*)—"It has been said that the trustees are to transfer the estate, and that the seisin and possession of the legal estate is necessary, in order to transfer it to the *cestui que trust*, when he comes of age. But they are not to transfer the legal estate, but the copyhold lands. A surrender may be necessary to transfer the legal estate, but copyhold lands may be transferred without any surrender." The trustees, therefore, in this case need not have been admitted tenants; or, at all events, they were improperly admitted as devisees in fee, for the testator only meant that the transfer should be

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(*a*) 1 Barn. & Cress. 343.(*b*) Id. 344.

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made to his wife, until the expiration of the leases; but if she died before, her interest was to determine with her life. Although, in *Bentham v. Wiltshire* (a), the Vice Chancellor held, that executors are empowered to sell a real estate where the power is expressly given to them, or is necessarily to be implied, from the produce being to pass through their hands in the execution of their office; yet here the trustees took no legal estate in the copyhold, either under the will or codicil, and the mere circumstance of their having been admitted, ought not to prejudice or affect the question. The lord is merely an instrument; he can only transfer an estate according to the surrender, and according to his authority. He cannot vary in person, estate, tenure, or in any other collateral points; if he exceed his authority, his admittance is good only *pro tanto* (b). In *Baddeley v. Leppingwell*, Mr. Justice *Wilmot* said (c)—“The lord is not entitled to his fine till admittance; but the admittance is merely form. The estate must be according to the surrender, and not according to the admittance.” And in *Zouch d. Forse v. Forse*, Mr. Justice *Lawrence* and Mr. Justice *Le Blanc* asked (d), if the lord admit one upon a mistaken claim, which turns out to have no foundation, how can that pass the estate to him? And Lord *Ellenborough* in giving his judgment said (e)—“An admittance to a copyhold does not in itself constitute a possession; it only gives the party the means of possession if he have a good title to it;” and here the admission of the trustees as devisees in fee was inconsistent with the legal title, and *ipso facto* void.

For the defendant, it was insisted, that the trustees named by the testator, took a legal estate in fee under the will and codicil taken together, in order to enable them to carry into effect the trusts of the will. Now, the codicil was made after the will. The testator in the first

(a) 4 Madd. 44.

(b) *Coke's Copyholder*, s. 41.

(c) 3 Burr. 1543.

(d) 7 East, 191.

(e) *Id.* 192.

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place devised to the trustees, and the survivor of them, or the executors or administrators of such survivor, his three freehold messuages, stock in the funds, money, and debts due, and all shares or property whereof he might be possessed or entitled to. *Hodsoll*, the surviving trustee, certainly took a larger estate than an estate for life: and when he entered on the trust with *Boucock*, they were empowered to dispose of the freehold messuages, by sale or otherwise, and make an equal division among the testator's children and *their heirs*. They, therefore, could not take a less estate than an estate in fee, and if they once took that estate, there is nothing in the will to divest them of it at a subsequent period, and the estate a trustee takes must be commensurate with the extent of the trusts. In *Doe d. Playerv. Nicholls* (a), a testator devised to trustees, in trust for his only son, all his freehold and copyhold lands, to be transferred to him as soon as he should attain twenty-one, and in case he should die before he attained that age, then to *A. B.*, his heirs, and assigns; and it was held, that the trustees took in the copyhold lands, an estate for years, determinable on the son's attaining twenty-one, or by his death before that period; and Mr. Justice *Holroyd* said—"There are no words in the will which give the trustees any estate beyond the time during which the trust was to be performed; and then the case falls within the general rule, that a trust estate is not to continue beyond the period required by the purposes of the trust." Here, however, the trustees were directed to sell the freehold, after the decease of the testator's wife and the children had all attained the age of twenty-one. In *Biscoe v. Perkins* (b), on a devise to trustees and their heirs, for the life of the devisor's son, to support contingent remainders, in trust to permit him to receive the rents for life, and, after his decease, to his first and other sons in tail—it was

(a) 1 Barn. & Cress. 336.

(b) 1 Ves. & Beames, 485.

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held, that the legal estate was in the trustees, as the purpose of preserving the contingent remainders required that it should be in them. If the testator had not made a codicil, there can be no doubt but that the copyhold estate would have passed to the trustees under the will, by which his freehold messuages, stock, money, debts, and all shares *or property* of which he was possessed, were devised to the trustees. Although the word 'property,' is found to be in connection with the word 'shares,' yet it is not to be restrained, or taken to apply to personal property, or to property *ejusdem generis*; for, in *Doe d. Wall v. Langlands* (a), where a testator, after giving several pecuniary legacies, bequeathed as follows:—To R. D., and E. W., I give and bequeath all and every the residue of my property, goods and chattels, to be divided equally between them, share and share alike; and it was contended that the word property was restrained by the subsequent words goods and chattels; yet Lord *Ellenborough* held, that the more obvious and natural sense was, that they should be taken *cumulative*, that is, as property, *and* goods and chattels, and consequently, that the real estate passed under the former words. Here, the testator did not mean to die without disposing of the whole of his property; and the Court will give an extensive rather than a restrictive construction to the whole of the will in order to carry his intention into effect. It is quite clear that the word *property* is sufficient to pass a copyhold estate, if it appear to be the intent of the testator that it should pass. Where it was necessary, to the legal operation of a devise of copyholds, that they should have been surrendered to the use of the will, the rule was, that copyholds not so surrendered would not pass under a general devise of lands, tenements, or hereditaments, or other general words descriptive of real estate; but, in *Nicholls v. Butcher* (b), where the testator devised all his

(a) 14 East, 370.

(b) 18 Ves. 194.

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real and personal property to his wife, it was held that a copyhold estate passed to her and her heirs; and the Master of the Rolls said—"I do not see how a man can be said to give all his property, unless all his interest in it passes." The word 'property,' therefore, is equivalent to estate in its operation to pass the interest as well as the land; and in *Noel v. Hoy* (a), where the testator nominated his wife his executrix, and bequeathed to her all the property of whatever description or sort that he might die possessed of, it was held to pass a copyhold estate belonging to the testator, which he had surrendered to the use of his will; and the Vice Chancellor said—"A testator is not to be confined to the technical sense of the words which he uses;" and thought that the criticism upon the words *possessed of* and *appropriated*, which were made the foundation of an argument for excluding the copyhold, was too nice. Again, by the codicil, the testator wills and directs that his copyhold estate should be transferred to his wife until the expiration of the leases. By whom, then, could it be transferred, but by the trustees. The customary heir was not bound to transfer, and the trustees were directed by the will to dispose of all the testator's *property*, and the transfer of the copyhold was one of the trusts for which they were named, as also the sale of the freehold. Although it has been said that the trustees take no legal interest, but a mere power of sale on the happening of a certain event, yet they are expressly directed to sell the freehold messuages, and make an equal division among the testator's children and their heirs. In *Coke Littleton* (b), *Littleton*, in treating of tenure in burgage, says: "A man may devise by his testament, that his executors may alien and sell the tenements that he hath in fee simple, for a certain sum, to distribute for his soul. In this case, though the deviser die seised of the tenements, and the tenements descend

(a) 5 Madd. 38.

(b) Section 169.

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unto his heir; yet the executors, after the death of the testator, may sell the tenements so devised to them, and put out the heir, and thereof make a feoffment, alienation, and estate by deed, or without deed, to them to whom the sale is made;" and, in *Sugden on Powers* (a), a distinction is taken, that "a devise of land to executors to sell, passes the interest in it; but a devise that executors *shall* sell the land, or that the lands shall be sold by the executors, gives them but a power:" and here, the trustees are expressly directed to make an equal division among all the testator's children, and their heirs, of his three freehold messuages, either by sale or otherwise, as might be deemed most conducive to the interest of his children.

It is stated as a fact in the case, that the plaintiff was let into possession by the testator's widow in 1823, and that he had remained in possession from that period up to the time of the distress; and although it may be said that there is no privity between her and the trustees, to constitute a tenancy, yet, if she only took an equitable estate, her connection with them is sufficient to raise a privity between the trustees and the tenant, as his right of possession was derived out of their estate, they having been legally admitted tenants of the premises in question, as devisees under the will. In *Gree v. Rolle* (b), it was held that the entry of the *cestui que trust* was sufficient to avoid the statute of limitations; and on that case being cited in *Lumley v. Hodgson* (c), Mr. Justice Bayley said—"The entry of an agent would be sufficient;" and that case establishes the principle, that a right to the rent enures according to the right of possession. If the testator's widow had only an equitable interest in the copyhold, the cognizance by *Hodsoll*, the surviving trustee, may be supported; but if she had the legal estate, or a chattel interest, it passed

(a) 3rd Edit. 108. (b) 1 Ld. Raym. 716. (c) 16 East, 103.

to *Burton*, her administrator: and, until the trustees have sold, her interest continues in him.

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&
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In reply, it was submitted that the trustees took no legal estate in the copyhold in question, either under the will or the codicil. Although the testator's widow had a continuing estate, *viz.* until the expiration of the leases, yet her interest determined on her death; and as all the children of the marriage had died before her, the interest of the trustees was also determined. The codicil is a substantive and distinct devise of the copyhold estate, and the widow might and ought to have been admitted for the term the leases had to run. The will and codicil might have been, and probably were, made on the same day; and although it has been said, that, as the trustees were admitted tenants, as devisees pursuant to the will, the legal estate was vested in them, yet they were improperly admitted as devisees in fee; and in *Hasset v. Hanson* (a), *Winch, J.*, said, "that the admittance of the lord, *viz.* the lessee of the manor, amounts to a grant to him who had a title; but it is otherwise if it is to him who was in by wrong, as by disseisin;" which was acceded to by all the Court.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—

This is an action of replevin, in which the defendant *first* makes cognizance as bailiff of *John Hodsoll*, for rent due the 25th *March*, 1828; and *secondly*, as bailiff of *John Burton*, for the same rent; and the question raised by the special case becomes this—Whether the trustees took such estate in the copyhold under the will or codicil, as to support the cognizances in the name of the surviving trustee, or whether the wife took such interest therein un-

(a) *Winch*, 67.

ler the codicil, as to support the cognizances in the name of her personal representative.

On looking at the will and codicil, which are framed very inartificially, with the view of discovering the intention of the testator, we think he did not intend to pass by his will any interest in the copyhold premises in question to the trustees therein named. The testator appears to have known the distinction between freehold, copyhold, and leasehold property; for, his will begins with the express devise to his trustees of three freehold messuages, and then gives direction as to the rents and profits of the same messuages, and *all other freeholds or leaseholds* that he might be possessed of; and he lastly directs the division of his said three *freehold messuages*, either by sale or otherwise, amongst his children. Looking, therefore, at the will alone, we see no words which would comprehend the copyhold within the devise to the trustees; for the word *property*, in the will, cannot be held to refer to real property, without doing violence to the context of the clause in which that word occurs; and when it appears that the testator, after making his will (though how long after is left uncertain) makes a codicil specifically disposing of his copyhold, it affords a strong ground of inference that the testator thought his copyhold property was not included in his will; and it still further supports this construction, that the general effect of the disposition of the copyhold by the codicil is the same as that of the freehold which had already passed by the will, viz. that the wife of the testator should receive the rents and profits during her life, and after her death a sale should take place, and a division be made amongst the children. So that the disposition of the copyhold made by the codicil would appear to have been unnecessary, except upon the supposition that the testator thought he had not disposed of it by the will. If, then, the copyhold did not pass by the will, as we think it did

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Monday,
May 24th.

CARTER and Another, Assignees of PEER, a Bankrupt, v.
BRETON.

A coach proprietor, after committing an act of bankruptcy, which was unknown to the defendant, requested him to accept a bill of exchange for 98*l.*, at three months' date, for his, the bankrupt's, accommodation. The defendant accepted the bill, which the bankrupt immediately indorsed, and gave to a creditor in payment for corn. After this transaction, but on the same day, the bankrupt agreed to sell the defendant four horses for 70*l.* as part of the amount of the acceptance. But, to accommodate the bankrupt, the defendant allowed him to run the horses in his coach for nearly six weeks; at the expiration of which period they were delivered to the defendant, who paid the bill when it became due. The Jury

THIS was an action of trover, and brought by the plaintiffs, as assignees of *Peer*, a bankrupt, to recover the value of four horses, alleged to be the property of the bankrupt. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, it appeared, that *Peer*, a coach proprietor, had committed an act of bankruptcy on the 10th *December*, 1828, and a second act on the 19th *January*, 1829; that the commission was sued out against him on the 23rd, and that an assignment of his property was made to the plaintiffs on the 3rd *February* following. It further appeared, that the bankrupt bought and sold horses, and drove and horsed his own coach from *London* to *Southampton*; that, on the 15th *December*, 1828, the defendant, the bankrupt, and one *Bamford*, a creditor of the latter, met at *Southampton*, and that *Peer* requested the defendant to accept a bill of exchange for 98*l.*, at three months' date, for his, *Peer's*, accommodation; that the defendant assented, upon which *Peer* drew the bill, which the defendant accepted, and which was immediately indorsed, and handed over by *Peer* to *Bamford*, in payment for oats and beans, who took it away; but that the defendant at that time did not know that *Peer* had committed any act of bankruptcy. After this transaction, but in the course of the evening of the same day, *Peer* and the defendant again met, when the latter said that he ought to have some security for his acceptance; upon which *Peer* agreed to sell the defendant four of his horses (the horses in question), for 70*l.*, as part

found that the sale of the horses was *bona fide*, and returned a verdict for the defendant:—*Held*, however, that the transaction was not protected by the 82nd section of the 6 *Geo.* 4, c. 16, as it only amounted to a set-off of the price of the horses against a bygone debt, and was not a payment by the bankrupt within the meaning of the act; and the Court directed a new trial.

by or on the bankrupt. *Secondly*, although in *Lydson(a)*, where the goods of a trader were distrained and it appeared that he had committed an act of bankruptcy previously to the distress, and that the purchaser allowed his wife and family to remain in possession of the sale under the distress; it was held that the goods did not vest in the assignees of the bankrupt under the Statute 21 Jac. 1, c. 19, s. 11, as they did not come into possession of the latter with the consent of the trader until after he had become bankrupt, and that the words in the statute, "at such time as he shall become bankrupt," have reference to the act of bankruptcy, at the time of issuing the commission, or when a party is duly declared bankrupt: yet, here, the horses not having remained in the possession of the bankrupt after his bankruptcy, but such possession remained unchanged until the sale to the defendant, which took place on the 10th December, 1828, and the bankrupt continued to drive in his coach until the 20th January following, with the consent of the defendant. The bankrupt, thereupon obtained a new credit by the horses remaining in his possession even after he had committed a second act of bankruptcy.

Mr. Serjeant *Wilde*, on a former day in this case, shewed cause.—The defendant agreed to become a surety for a debt due from *Peer* the bankrupt to *Bamford* for his creditors, and for that purpose accepted a bill of exchange in the commodation of *Peer*, and for which he was to be bound. He, however, shortly afterwards agreed to sell to the defendant the four horses in question for 70*l.*, the amount of the bill being 98*l.*; but as *Peer* said he wished to retain them some time longer for drawing his coach, the defendant agreed to let him do so, but they were afterwards sent to the defendant, who took up the bill when at maturity. The ho-

(a) 9 B. Moore, 629; S. C. 2 Biog. 334.

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of a bankrupt in the ordinary course of trade, and the goods were such as he usually dealt in. The sale, therefore, raised an obligation on the purchaser to pay for them, whilst here, there were two distinct and separate transactions between the defendant and *Peer*, viz. the acceptance of the bill for the accommodation of the latter, and subsequently the transfer of the horses to the defendant, by way of security for the payment of the bill when it should arrive at maturity. When the defendant gave the acceptance, and the bill was indorsed by *Peer* and transferred to *Bamford*, the sale of the horses had not been thought of. It was, in fact, a mere accommodation bill, which *Peer* was to provide for, and the defendant lent his name to make it a negotiable security. This case, therefore, falls within that of *Bishop v. Crawshay*, where Lord Chief Justice *Abbott* said (a)—“The defendants were not debtors of the bankrupt at the time when they accepted the bill; he had no claim on them at that time; and, if he had not become bankrupt, he could not in respect of any demand then existing, have maintained any action upon the bill.” So, here, the defendant was not a debtor of the bankrupt at the time he gave his acceptance, and a payment to be protected within the 82nd section of the statute must be a *bond fide* payment to a creditor, and not *quasi* a creditor; for, as Mr. Justice *Holroyd* said, in *Bishop v. Crawshay* (b), “There was no existing debt due from the defendants to the bankrupts at the time when they accepted the bill, and it was not certain that there ever would be such a debt; and, as there was no appropriation of the acceptance as a payment for the particular goods ordered, the money paid in consequence of that acceptance cannot be considered a payment made by a debtor of the bankrupt within the meaning of the 1 *Jac.* 1, c. 15, s. 14. Unless, therefore, a

(a) 3 Barn. & Cress. 418.

(b) *Id.* 419.

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payment be *bond fide*, and contemporaneous with a sale, it cannot be protected, or fall within the 82nd section of the statute 6 Geo. 4, by a subsequent arrangement between the parties.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

One question in this case, and the only one upon which it is necessary to give a decision, is, whether the transaction between the bankrupt and the defendant, under which the delivery of the horses in question was made, falls within, and is protected by the 82nd section of the statute 6 Geo. 4, c. 16.

The defendant, at the request of the bankrupt, after he had committed a secret act of bankruptcy, accepted a bill of exchange for 98*l.*, for the accommodation of the bankrupt, which bill was given to *Bamford*, a creditor of the bankrupt, who carried it away. In the course of the same evening, but after that transaction was completed, the bankrupt and the defendant had a further conversation as to the security to be given to the defendant for his acceptance; and, it was agreed between them, that the bankrupt should sell four of his horses to the defendant, being the same horses for which this action of trover was brought, for 70*l.*, being part of the amount of the acceptance. The horses were, at a subsequent time, put into the possession of the defendant, and the bill for 98*l.*, was paid by him when it arrived at maturity. These are the facts of the case; and it is contended for the defendant, that the transaction is protected by the 82nd section of the statute, on the authority of two cases to which we have been referred. It is to be observed, that, in each of these cases, the transaction was that of a direct and distinct sale and payment of the price; and the Court of *King's Bench* held

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the earlier case to be within the statute 1 *Jac.* 1, c. 15, and the latter within the 82nd section of the recent statute 6 *Geo.* 4, c. 16, not upon the ground that the property passed by the sale, but that the payment could not be deemed a valid payment for any beneficial purpose to the party paying, unless he was allowed to retain the goods so long as he was kept out of the money. In fact, not one of the bankrupt acts protects a sale by the bankrupt, as a sale, but merely the payment of the price. But this case appears to us, not to be so much a sale of goods with payment of the price, as a sale of goods with an agreement to set off the price against a liability on the part of the bankrupt. It would be dangerous to extend the application of the decided cases, so as to give effect to a set-off in consequence of a subsequent sale. This was an acceptance by the defendant for a larger sum, without any reference to the sale of the horses, which was not then thought of; and whether at a short interval before, or at a long one, can make no difference in the principle of the decision. Treating, therefore, the acceptance of the bill by the defendant, which was afterwards honoured by him, as an actual advance of money, which is the most favourable way of considering it for the defendant, the transaction amounts to no more than a set-off of the price of the horses against a bygone debt, which set-off is agreed upon after a secret act of bankruptcy; and we do not think this can, in any point of view, be considered a payment within the 82nd section of the act. The case seems to us to come nearer to that of *Bishop v. Crawshay*, cited for the plaintiffs, than that of *Hill v. Farnell*. On the whole, therefore, we think that this was not a payment protected by the statute, and, consequently, that the rule for a new trial must be made absolute. Although [the price fixed for the horses was 70*l.*, yet their value might not have been one half that sum. It is therefore advisable that the

cause should not go down to another Jury. That, however, is matter of arrangement between the parties, and, if they cannot agree, this rule must be made—

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Absolute.

BLOGG v. KENT.

Monday,
May 24th.

THIS was an action of *assumpsit*. The declaration contained four special counts, in which the plaintiff alleged, that the defendant had agreed to take him, the plaintiff, into his, the defendant's, service, and to employ him for the space of a year; and, at the expiration of that period, to take him into partnership. Breach, for not receiving the plaintiff into the defendant's service. To these were added the common money counts. The defendant pleaded—*first*, the general issue to the whole declaration—*secondly*, as to the promises by the defendant in the first four counts of the declaration mentioned, the defendant said, that there was no agreement or memorandum, or note thereof in writing, signed by the defendant or the party to be charged therewith, or by any other person thereunto by him lawfully authorized, as required by the statute of frauds. Replication, that there was an agreement or memorandum or note thereof in writing, signed by one *George Blogg*, he being a person lawfully authorized by the defendant so to do. Upon this replication issue was joined; and the defendant afterwards obtained an order of Mr. Justice *Bosanquet*, calling on the plaintiff to shew cause why he should not permit the defendant to inspect and take a copy of such agreement.

The plaintiff in his declaration alleged, that the defendant had agreed to take him, the plaintiff, into his, the defendant's, service for a year, and at the expiration of that period, to take him into partnership. Pleas, *first* the general issue; and *secondly*, that there was no agreement or memorandum in writing, as required by the statute of frauds. Replication, that there was an agreement in writing; on which issue was joined:—*Held*, that the defendant was entitled to inspect the agreement, although it was sworn that it consisted only of a letter written by the defendant's agent.

Mr. Serjeant *Taddy*, on a former day in this Term, ob-

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tained a rule *nisi* to discharge this order, on affidavits, which stated, that the agreement or memorandum referred to by the plaintiff in his replication, consisted of a letter written by *George Blogg*, the defendant's agent; upon which it was submitted, that, as the action was not brought on a written agreement, and the plaintiff had not declared thereon, he was not bound to produce it; for, in *Hill v. Aland* (a), where an action was brought upon a special agreement contained in a note, and the defendant obtained a rule to shew cause why the plaintiff should not give him a copy, the Court discharged the rule, because the contract upon which the action was founded was a parol contract, of which the note was only evidence. So, here, the letter was only evidence of the contract declared on, and the defendant's plea, in fact, amounts to the general issue, and the letter in question might have been required to be given in evidence under it. In *Bateman v. Phillips* (b), where a person was sued on a written security, which he had given for the benefit of third persons, and he afterwards got possession of the writing, the Court, on the application of a third party (the plaintiff), who claimed an interest in the paper, though he had not signed it, compelled the defendant to produce it, that it might be stamped previously to the trial; yet the ground of the application there was, that the applicant had an interest in the writing, which was originally deposited in the hands of a third person for the benefit of the creditors of a bankrupt, who brought the action.

Mr. Serjeant *Wilde* now shewed cause, on affidavits by the defendant and his attorney, which stated that the defendant had no copy of the agreement or memorandum referred to by the plaintiff in his replication. The learn-

(a) 1 Salk. 215.

(b) 4 Taunt. 157.

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KENT.

ed Serjeant submitted, that, as the plaintiff in his replication had shewn that the contract between him and the defendant was not to be performed within a year, as the latter was to be taken into partnership after serving for that period, the action could not be maintained unless there were an agreement, or some note or memorandum thereof, in writing, and signed by the party to be charged, or his agent; and as the plaintiff alleged in his replication, that there was an agreement in writing, and the defendant had sworn that he had no copy of it, the plaintiff must be taken to hold it as a trustee for both parties, and was therefore bound to produce it to the defendant, and allow him to take a copy, according to the terms of the Judge's order.

Mr. Serjeant *Taddy*, in support of his rule.—As the action was not founded on an agreement in writing, nor did the plaintiff declare upon it as such, this case does not fall within the general rule, which requires a party to a suit, who has writings in his possession, to produce them to another for his inspection, provided he has an interest in them. The letter in question might be given in evidence under the general issue, as it was only evidence of the contract, and not the contract itself. The terms of the defendant's contract or undertaking to take the plaintiff into his service, might be proved by parol. If the defendant had only pleaded the general issue, he would not have discovered that any agreement in writing existed, and the Court will not place him in a better situation by his having put an unnecessary plea on the record.

Lord Chief Justice TINDAL.—The fourth section of the statute of frauds (a), enacts, "that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof; unless the

(a) 29 Car. 2, c. 3.

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agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Here, it appears, on the face of the declaration, that the act upon which the agreement is founded, is not to be performed within a year, as it is alleged that the defendant had agreed to take the plaintiff into partnership at the expiration of that period: and the defendant has pleaded that there was no agreement, or memorandum or note thereof, in writing, signed by the defendant, or any person thereunto by him lawfully authorized, as required by the above statute. But the plaintiff has replied that there was an agreement or memorandum or note thereof in writing, signed by one *George Blogg*, he being a person lawfully authorized by the defendant. It therefore appears, on the whole of the pleadings, that there is a note or memorandum in writing of the agreement or contract for the breach of which the plaintiff seeks to recover. Although the second plea may amount to the general issue, and the letter in question might be given in evidence under it, yet the defendant had a right to put such a plea on the record, and, for the purposes of this application, it must be taken as if there were one plea only; for, the only issue between the parties is, whether there is an agreement or memorandum in writing, and the plaintiff in his replication has alleged that there is. This, therefore, is virtually part of the record, and refers to the contract or agreement in the special counts of the declaration, which shews that the agreement was not to be performed within the space of a year. The defendant, therefore, is entitled to inspect the agreement; and it comes round to the ordinary case, that, where there is only one copy of the contract between two parties in a suit, the one who holds it, holds it as a trustee, and is bound to pro-

duce it to the other, provided he has an interest in it, or it is necessary for his defence to the action.

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The rest of the Court concurring—

Rule discharged.

DOE, on the Demise of PEARSON, v. ROE.

Monday,
May 24th.

A RULE was obtained by Mr. Serjeant *Storks*, on a former day in this Term, calling on the lessor of the plaintiff to shew cause why one *William Fincham* should not be permitted to defend this action of ejectment, as landlord, under the statute 11 *Geo. 2*, c. 19, s. 13 (a). The motion was founded on an affidavit, which stated, that the premises sought to be recovered were mortgaged by three persons of the name of *Knapp*, to *Fincham*, in 1828, subject to an equity of redemption; that the mortgage had become forfeited, 3,000*l.* being now due and unpaid to the mortgagee; that the tenant in possession had declined to defend; and that this application was made on behalf of *Fincham*, the mortgagee. The learned Serjeant referred to the case of *Lovelock d. Norris v. Dancaster* (b), where the Court permitted an heir-at-law and devisee in trust to defend as landlord; and *Doe d. Tilyard v. Cooper* (c), where a mortgagee was allowed to be made defendant with the mortgagor.

The Court will not permit a mortgagee to come in and defend as landlord in an action of ejectment, under the statute 11 *Geo. 2*, c. 19, s. 13, unless he shews that the application is made at his instance and request, and that he is *bona fide* interested in the result of the suit.

Mr. Serjeant *Wilde* now shewed cause.—The Court will not permit a mortgagee to come in and defend as land-

(a) See this section, next page. Term Rep. 122.

(b) 3 Term Rep. 783; S. C. 4

(c) 8 Term Rep. 645.

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d.
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v.
ROE.

lord, unless he shews that the application is made *bond fide*, and at his sole instance, and also that his title is likely to be affected. He ought not to be allowed to prejudice the rights of the mortgagors; and if the lessor of the plaintiff recovers in this action, it may be consistent with the title of the mortgagee.

Mr. Serjeant *Storks*, in support of his rule.—It must be assumed that a mortgagee has an interest in any question touching the land which has been conveyed to him by mortgage, although he has not previously exercised any act of ownership over the property. The only object of the present application is to prevent circuity of action, and it is quite clear, that, if the legal title is in the mortgagee, he may bring another action. There is no suggestion that there has been any collusion between the parties. In *Doe d. Tilyard v. Cooper*, the Court permitted the mortgagee to be made defendant with the mortgagor, on the mere simple statement that he was the mortgagee.

Lord C. J. TINDAL.—This is a motion founded on the statute 11 *Geo. 2*, c. 19, s. 13, by which it is enacted, “that it shall be lawful for the Court in which an ejectment is brought, to suffer the landlord to make himself defendant, by joining with the tenant or tenants, to whom the declaration in ejectment shall be delivered, in case he or they shall appear; but in case such tenant or tenants shall refuse or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance; but, if the landlord of any part of the lands, &c., for which such ejectment was brought *shall desire* to appear by himself, and consent to enter into the like rule that, by the course of the Court, the tenant in possession, in case he had appeared, ought to have done; then the Court where such ejectment shall be brought, shall and may permit such landlord so to do, and order a stay of execution upon such

judgment against the casual ejector, until they shall make further order therein." Although this clause has been beneficially construed to extend not only to landlords properly so called, who are in receipt of the rents and profits of the premises, but also to all persons claiming title thereto consistently with the possession of the occupier, as to a mortgagee, yet the question in such a case is not only whether the application is made at the instance of the mortgagee, but whether he is really and *bonâ fide* interested in the result of the suit, or whether he is merely put in motion to answer the purposes of some third party, who seeks to set up his own interest through the mortgagee. Here it is merely sworn that the application was made on behalf of the mortgagee, but he does not state that he is himself interested in the matters in dispute between the parties to the suit, and it is probably immaterial to him whether the tenant holds immediately under the mortgagors, or any other person. The mortgagee might remain in the same situation whatever the result of this action might be, and he does not even state that it was his wish to defend as landlord. It was probably the desire of his attorney that he should do so, and there may be a prior mortgagee who may set up his claim at the trial. We therefore think that the present applicant does not bring himself within the terms of the statute, as he does not shew that he is himself desirous of being permitted to defend as landlord, or that he has any interest in the subject matter in dispute.

Per Curiam—

Rule discharged.

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DOE
d.
PNARSON
v.
ROE.

1830.

Monday,
May 24th.

GODEFROY v. JAY, Gent. One &c.

In an action brought in this Court against an attorney for negligence, he, after a special, instead of a general special imparlance, pleaded his privilege in abatement, as an attorney of the Court of King's Bench. The plaintiff having treated the plea as a nullity and signed judgment; the Court set it aside, on the terms of the defendant's pleading issuable, and to merits; although the plea might not have been sustainable on demurrer.

THIS was an action on the case, and brought against the defendant, an attorney, for negligence in allowing judgment to go by default, in an action which the plaintiff had retained him to defend. The writ was sued out on the 13th *November*, 1829, but the declaration was delivered too late in the last *Hilary* Term to entitle the plaintiff to a plea of that Term. The defendant, on the first day of this Term, came in his proper person, and "saving to himself all advantages and exceptions, as well to the writ as to the declaration, prayed leave to imparl thereunto, here, until, &c., and it is granted to him &c." He afterwards pleaded his privilege in abatement, as an attorney of the Court of *King's Bench*. The plaintiff treated this plea as a nullity, and signed interlocutory judgment as for want of a plea.

Mr. Serjeant *Cross*, on a former day in this Term, obtained a rule calling on the plaintiff to shew cause why this judgment should not be set aside for irregularity, with costs.

Mr. Serjeant *Wilde* now shewed cause.—The plea is a nullity, as it is pleaded to the jurisdiction of the Court. At all events, it is bad after a special imparlance, for, when a party comes into Court and craves its indulgence by imparling and saving to himself all advantages and exceptions to the writ and declaration, he cannot afterwards dispute or deny the jurisdiction. In *Chatland v. Thornley* (a), where an attorney, being sued by bill, pleaded his privilege not to be compelled to answer any bill exhibited against him in the custody of the marshal &c., and concluded by stating that the Court would not take further

(a) 12 East, 544.

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cognizance of the action aforesaid depending against him (instead of praying judgment of the bill, and that it might be quashed), the Court said, "that it was not to be considered as a plea to the jurisdiction: it only objected to the Court's taking cognizance of the action against one of its attorneys in this form: it does not deny that the Court have jurisdiction in another form. Therefore, they gave judgment that the Court would not take further cognizance of the action in this form, and that the bill should be quashed." Here, however, the defendant has pleaded, that he is an attorney of the Court of *King's Bench*, and not of this Court, and that he is not liable to be sued here, which is clearly a plea to the jurisdiction. Mr. Serjeant *Williams*, in a note to *Mellor v. Walker* (a), says—"The defendant cannot, after a special imparlance, plead to the jurisdiction of the Court; therefore, if he be entitled to an imparlance to the next term, and would plead to the jurisdiction, he must have a still more special imparlance, *with a saving of all advantages and exceptions whatsoever*. This is usually denominated *a general special imparlance*, and can only be obtained by an application to the Court on motion, within the first four days of the next Term; and it is in the discretion of the Court, governed by the particular circumstances of the case, to grant it or not. If the defendant plead in abatement after a general imparlance, or to the jurisdiction after a special imparlance, the plaintiff may either sign judgment, or apply to the Court to set aside the plea; or he may demur to it." In *Bacon's Abridgment* (b), it is said—"After a general imparlance, an officer cannot plead his privilege, because, by imparling, he affirms the jurisdiction of the Court; but, by the better opinion, it seems, that, after a special imparlance, he may plead his privilege." And Mr. *Gwillim* states, in a note—"By a special imparlance in

(a) 2 Wms. Saund. 2 (b.) n. 2.

(b) 5th Edit., by *Gwillim*, tit. "*Abatement*," C.

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this case, must be understood a general special imparlance." In *Grant v. Lord Sondes*, Lord Chief Justice *De Grey* said (a)—"Every dilatory plea is held strictly to certain rules. They must be offered in the first instance, and pleaded without any repugnancy. They cannot be pleaded after a general imparlance, because when you ask a favour and gain time, you admit all before to be right. To avoid the injustice that might sometimes happen by adhering too strictly to this rule, two special manners of imparling are allowed; there being three kinds of imparlances in all. The first sort of special imparlances saves to the defendant the right of excepting to the writ and count, and these are granted of course, upon application at the office. The other sort of special imparlances (which saves all manner of exceptions, and, among the rest, the exception to jurisdiction) is discretionary. It must depend on particular circumstances, which are left to the decision of the Court." That is the true distinction; and here, as the defendant pleaded to the jurisdiction of the Court, without applying for a *general special* imparlance, the plaintiff had a right to treat the plea as a nullity, and to sign judgment.

Mr. Serjeant *Cross*, in support of his rule.—A plea to the jurisdiction, is not properly a plea in abatement, though in its consequence it be so (b). In *Wentworth v. Squib* (c), the Court held, that, after a special imparlance (*salvis exceptionibus tam ad breve quam ad narrationem*), one may plead in abatement of the writ or count; after a still more special imparlance (*salvis omnibus exceptionibus et advantagiis quibuscunque*), one may plead to the jurisdiction of the Court. There, the question arose on demurrer, and it is clear, that such a plea may be pleaded after a special imparlance. In *Chatland v. Thornley*, no question

(a) 2 Sir W. Bl. 1096. (b) Bac. Abr. Tit. "Pleas and Pleading," E. 2.

(c) 1 Lutw. 46; S. C. 12 Mod. 529.

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arose as to an imparlance, but merely as to the form of the conclusion of the plea, by which the Court said, that it could not be considered as a plea to the jurisdiction. Lord Chief Baron *Gilbert*, in his History of the Court of *Common Pleas*, says (a),—"Privilege can be only pleaded after a general imparlance, because it is neither an objection to the writ, bill, or count. 1 *Sid.* 29, 2 *Rolle's Rep.* 244, seems to be contrary, and that privilege cannot be pleaded after imparlance; it is not said, in either of the cases, that it was a special or general imparlance, and the latest resolution, viz., *Hardres* and *Lutwyche*, are express in point, that it may be pleaded after a special imparlance, for it does not *oust* them of their jurisdiction, but is a privilege which each Court allows the officers of another, to be sued in their own Court." In *Bell v. Alexander* (b), the Court held, that the plaintiff cannot treat a plea as a nullity, and sign judgment, unless it be palpably a sham plea. The plaintiff, therefore, should either have applied to the Court to set aside the plea, or he ought to have demurred to it, and not have treated it as a nullity and signed judgment in the first instance.

Lord Chief Justice TINDAL.—We think that if this plea had been demurred to, it could not have been sustained. At the same time, as the question involves a point of some nicety, it was too much for the plaintiff to take it upon himself to treat it as a nullity and sign judgment. The judgment therefore must be set aside, on the terms of the defendant's pleading issuably, and to merits, and the costs of setting aside the judgment must be taken as costs in the cause.

The rest of the Court concurring—the rule was, on these terms, made—

Absolute.

(a) 2nd Edit. Page 185.

(b) 6 Mau. & Selw. 133.

1830.

REG. GEN.

REGULA GENERALIS.

Motions for new trials.

IT is ordered by the Court, that, in future, in *Hilary* and *Trinity* Terms, no motion for a new trial shall be heard, unless such motion be actually made within the first four days of each of the said Terms.

N. C. TINDAL,
J. A. PARK,
S. GASELEE,
J. B. BOSANQUET.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN TRINITY TERM,

IN THE ELEVENTH YEAR OF THE REIGN OF GEORGE IV.

SHARP v. SHARP.

1830.

THE following case was sent by his Honour, the Master of the Rolls, for the opinion of this Court:—

“ *Thomas Sharp*, late of *Silver Street*, in the parish of *St. Botolph*, in the town of *Cambridge*, tailor, deceased, the late husband of the defendant, being in his life-time and at the time of his death seised in fee-simple of, or well entitled to, considerable real estates, made his will, bearing date the 30th *October*, 1822, and thereby, after directing that his just debts, funeral expenses, and the charges of proving his will, should be paid and satisfied by his executrix and executors thereafter named, and after giving several pecuniary legacies for the benefit of his children therein mentioned, proceeded in the words following, that is to say—‘ I give and bequeath to my dear wife *Emilia Sharp* the whole of my remaining property,

A testator, after directing that his debts should be paid, and giving various pecuniary legacies to his children, gave and bequeathed to his widow, “ the whole of his remaining property, in the Bank of *England* or otherwise, and also a freehold house in *St. B.* also a freehold estate in *St. A.*— (with other freehold lands enumerated), also, copyhold estate of the manor of *E. B.*, also a leasehold estate in *St. A.*, with all right and title to the same :

—*Held*, that the widow took an estate in fee simple in the freehold, and a customary fee in the copyhold estate.

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in the Bank of *England* or otherwise; and also a freehold house which I now live in, situated in *Silver Street*, in the parish of St. *Botolph*, in the town of *Cambridge*; also a freehold estate in *Regent Street*, in the parish of St. *Andrew*, in the town of *Cambridge*; also about sixty-one acres of freehold land, with a house and barn thereon, situated in the fens, and in the parish of *Bottesham*, in the county of *Cambridge*; also about sixteen acres of fen land, freehold, with a house and barn thereon, adjoining the above sixty-one acres of land in *Bottisham* fen; also about twelve acres of freehold fen land in the parish of *Stretham*, in the Isle of *Ely*, in the county of *Cambridge*; also a copyhold estate of the manor of *Ely Barton*, and now occupied by Mr. *Benjamin Pope*, of *Stretham*, and is the estate I lately purchased of Mr. *Aswell Peacock*; also a leasehold estate purchased of the assignees of Mr. *D. Blacklee*, and which is in the parish of St. *Andrew the Less*, otherwise called *Barnwell*, in the town of *Cambridge*: with all right and title to the same. I also leave my wife all monies that should be in my possession at my decease, and all monies due to me on all mortgages, notes or note of hand, with all interest due thereon; also all my household furniture, plate, linen, china, and glass, and all other effects. I also leave my dear wife, *Emilia Sharp*, all my share of the property due to me out of the business as carried on in the firm of Messrs. *William Sharp*, *Thomas Sharp*, and *Frederick Sharp* only: the property so belonging to my share consists of estates, freehold and leasehold, mortgages, bonds, notes of hand, bills and drafts, cash, and monies in the bankers' hands, and outstanding debts, and the stock in trade.'

" The testator died on the 6th *March*, 1823, without revoking or altering his will, leaving the defendant, his widow, and the plaintiff, his eldest son and heir-at-law, and also his heir by the custom of the manor of *Ely Barton*, him surviving.

“ The estates devised by the said will consisted of the several freehold and copyhold messuages, lands, tenements, and hereditaments, in the will particularly described.”

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The question for the opinion of the Court was—“ whether the defendant, *Emilia Sharp*, was entitled to an estate for her life, or to an estate in fee simple in all or any, and which, of the messuages, lands, tenements, and hereditaments, devised by the said will of her late husband, *Thomas Sharp*, the testator.”

The case came on for argument in the course of the last *Easter Term*.

Mr. Serjeant *Scriven*, for the plaintiff.—The defendant, the widow of the testator *Thomas Sharp*, took only an estate for life. It is a long established rule of law, that, unless in the will are found words whereby the Court can be warranted in enlarging the limitation to a fee simple, they are bound to hold it to convey an estate for life only. This has been the constant practice from the case of *Fairfax v. Heron* (a), down to the present time, and the rule is not now to be shaken. There must be shewn on the face of the will a clear intent to give to the wife an estate in fee, to the exclusion and disherison of the heir-at-law. It may either be done by express words of limitation, or by inference; but it must be shewn to be so by necessary implication. The will in this case is extremely confused as to the description of the testator's property. The word “ estate ” is used with reference to one part of it, and the word “ land ” only with reference to other part. The case of *Rex d. Bowes v. Blackett* (b) establishes that no general intent shall alter the rule of law; but that the intention must be manifest and clear, not merely conjectural. It has frequently been held that the introductory words of a

(a) Pree. in Chan. 68.

(b) Cowp. 240.

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will may be used as pointing out the intention of the whole. There are, however, none such in this will. The concluding words of the devise may be relied on as conveying an estate in fee to the widow; and the question is, whether or not they over-ride the whole will. The words "as to all my worldly estate," have been held to pass a fee—*Loveacres d. Mudge v. Blight* (a); but they have also been frequently qualified. In *Denn d. Gaskin v. Gaskin* (b), the testator devised thus—"as to all such worldly estate as God has endued me with, I give and bequeath as follows: I give and devise all that my freeheld messuage and tenement lying in G., together with all houses, &c., and appurtenances whatsoever belonging to the same, to M. R., G. R., and T. R. equally;" and then bequeathed, amongst other pecuniary legacies, ten shillings to his heir-at-law: it was held that the devisees took an estate for life only. So, in *Frogmorton d. Wright v. Wright* (c), it was held that general introductory words in a will "as touching all my temporal estate, &c.," though they have some effect in the construction of the will, are not of themselves sufficient to extend a devise for life to a fee; and in *Goodright d. Drewry v. Barron* (d), where, after the introductory words, "as touching the testator's worldly estate, &c." he devised a cottage, house, &c., to A. and his heirs, and also gave to B., whom he named his executrix, "all and singular his lands, messuages, and tenements, by her freely to be possessed and enjoyed:" it was held that the latter words, being ambiguous, did not pass the fee against the heir, but might mean free of incumbrances, or disposable of waste; and that the word "estate," in the introductory clause, could not be brought down into the latter distinct clause. So, the word "hereditaments" has

(a) Cowp. 352.

Blac. 889.

(b) Cowp. 660.

(d) 11 East, 220.

(c) 3 Wils. 414; S. C. 2 Wm.

been held not *per se* to pass a fee. *Canning v. Canning* (a). *Denn d. Moore v. Mellor* (b). In the present case, the word "estate" is used merely as a word of locality, and is only used once, in reference to the house in *Regent Street, Cambridge*. In *Wilkinson v. Merryland* (c), the testator, being possessed of lands in *A.*, *B.*, and *C.*, in fee, devised the lands in *A.* and *B.* to several persons, and their heirs, and then, after giving several small legacies, devised to his wife—"all the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods, whereof he was possessed, after his debts and legacies paid"—it was held that the wife took only an estate for life. Where debts are charged on the freehold estate the fee will sometimes pass. *Canning v. Canning*. *Dickins v. Marshall* (d). But in *Doe d. Small v. Allen* (e), where the testator devised thus: "As to what real and personal estate it has pleased God to bless me with (all my debts, &c., being first paid out of my personal, and if that is not sufficient, out of my real estate), I give and dispose of the same as follows: I devise all my messuages, lands, tenements, and hereditaments in *S.*, &c., to *A.*"—it was held that *A.* took only a life estate. In *Denn d. Mellor v. Moore*, *A.*, possessed of real and personal property, devised as follows: "All the rest of my lands, tenements, and hereditaments, either freehold or copyhold, and also all my goods, chattels, and personal estate, after payment of my just debts and funeral expenses, I give, devise, and bequeath the same to my wife *B.*;" appointing *B.* sole executrix—the Court of *King's Bench* (f) held that these words gave *B.* only an estate for life in the realty. This judgment was reversed in the *Exchequer Chamber* (g), on the ground that there was a clear intent

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(a) Moseley, 242.

(b) 5 Term Rep. 558.

(c) Cro. Car. 447, cited in 1 Comyn, 339.

(d) Cro. Eliz. 330.

(e) 8 Term Rep. 497.

(f) 5 Term Rep. 558.

(g) 2 Bos. & Pul. 247.

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to convey the fee; but the *House of Lords*, on appeal (a), reversed the judgment of the *Exchequer Chamber*, and affirmed that of the Court of *King's Bench*. Here, however, the debts are specifically charged upon the personalty. The general rule, however, is clear, that the heir-at-law shall not be disinherited unless the intention of the testator be distinct and manifest. In *Right d. Mitchell v. Sidebotham* (b), the testator devised as follows: "I give and devise to A., her heirs and assigns for ever, all my lands at B., and I give and bequeath to A. aforesaid, all my lands at C."—it was held that A. took an estate for life in the lands at C., and that the reversion thereof should descend, although the will began with these introductory words—"for those worldly goods and estates wherewith it hath pleased God to bless me," and contained a legacy of one shilling to the heir-at-law. In *Doe d. Spearing v. Buckner* (c), the testator, having given 4,000*l.* to A. and B., in trust for certain persons, by a residuary clause gave "all the rest of his estate and effects, of what nature soever, to A. and B., their executors and administrators, in trust to add the interest to the principal, so as to accumulate the same, it being his will that the residue should not pass but at the time and manner as the principal sum of 4,000*l.* was directed to be paid"—it was held that a house, the only freehold of which the testator was seised, did not pass by the will, notwithstanding there were general words in the introductory clause, "as to all my estate and effects, both real and personal." And in *Doe d. Child v. Wright* (d), a distinction was made between "estate" and "land." There, the deviser, after the introductory words, "as touching such worldly and personal estate wherewith it has pleased God to bless me," gave an estate for life to his wife in his estates in A. and B., and then devised to

(a) 7 Bro. P. C. 607.

(c) 6 Term Rep. 610.

(b) 2 Doug. 759.

(d) 8 Term Rep. 64.

F. W. “all his *lands*, freehold, copyhold, and leasehold, in *A.* ;” “also all his *estate*, freehold and copyhold, in *B.* ;” and it was held that *F. W.* took only an estate for life in remainder in the devisor’s estate in *A.* The concluding words of the devise in this case, which will be relied upon for the defendant—“with all right and title to the same”—must be taken to refer to the description of property last mentioned in the will, *vis.* to the leasehold in *Barnwell*, to which they are more properly applicable. Taking the whole of the will together, there is an entire absence of all words tending to shew an intention in the testator to disinherit the heir-at-law, who is entitled to the favour the Court.

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Mr. Serjeant *Adams, contra.*—The testator’s widow took a fee in all the property devised. The general principle contended for on the part of the heir-at-law, is not questioned. Undoubtedly, the heir is not to be disinherited unless a clear intent to that effect appears upon the face of the will; neither will the word “estate” pass a fee unless the intention of the testator manifestly be that the fee shall pass. In *Andrew v. Southouse (a)*, a devise of the testator’s lands at *W.*, and all his interest in the estates of *F. C.*, deceased, to *L. A.* for life, and after *L. A.*’s decease to *E. S.*, charged with an annuity for *F. T.* for life, was held to give a remainder in fee to *E. S.*; and Lord *Kenyon* there said—“For nearly half a century it has been the wish of the Courts to give effect to the intention of the devisor as far as they can. It has frequently been observed, that, in almost every case where the words of the devise have been so restrained as to give only an estate for life, the decision has been against what may be supposed to have been the private intention of the devisor; and Lord *Mansfield* often said that it appeared to

(a) 5 Term Rep. 292.

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him that persons in general who made their own wills thought that the same words were sufficient to pass an estate of inheritance that are used to convey a mere chattel interest." In this case the intention of the testator is manifest, and the Court will give effect to it. He first directs that his debts, funeral expenses, and the charges of proving his will, shall be paid by his executors, he then, after several pecuniary bequests to his children, proceeds to give to his wife "the whole of his remaining property," in the Bank of *England* or otherwise; and also a *freehold house* in *Silver Street*, a *freehold estate* in *Regent Street*, and other freeholds, and also a *copyhold estate* and a *leasehold estate*; and concludes the devise with these words—"with all right and title to the same." In *Cole v. Rawlinson* (a), a devise of all "right, title, and interest," was held to pass the fee. In *Holdfast* d. *Cowper v. Marten* (b), it was decided that the word "estate" will always pass a fee, unless there be words of restraint found in the will—limiting it to a less estate. And in *Fletcher v. Smitton* (c), it was also held, that the word "estates" in a will carries the fee, unless coupled with other words which shew a different intention. In *Right* d. *Mitchell v. Sidebotham*, the testator knew exactly what he was doing. There, there were two distinct and specific bequests.

Mr. Serjeant *Scriven*, in reply.—In *Andrew v. Southouse*, the land devised was charged with an annuity; it was therefore necessary that the devisee should take a fee, in order to carry into effect the intentions of the testator. That case, therefore, has no application to the present. In *Cole v. Rawlinson*, the earlier part of the will gave a rule of construction, a key to the intent of the testator, which did not militate against any rule of law. The limita-

(a) 3 Bro. P. C. 7.

(b) 1 Term Rep. 411.

(c) 2 Term Rep. 656; S. C. 2

Chit. Rep. 558.

tion here is the very reverse of the limitation in that case. *Doe d. Child v. Wright* shews the disposition of the Courts to restrain the words of a will to a life estate, where the intention of the testator to give a fee is not perfectly apparent, *Doe d. Ellam v. Westley* (a) tends very much to shake the authority of *Cole v. Rawlinson*. Mr. Justice *Bayley* there said (b)—“In order to say that more than a life estate passed, we should require words expressing a plain intent to that effect.” *Roe d. Helling v. Yeud* (c), and *Timewell v. Perkins* (d), are also authorities to shew that the Courts strongly incline to cut down a devise to a life estate, unless there be a clear intention manifested to the contrary.

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The following certificate was afterwards sent to the Master of the Rolls:—

“We have heard this case argued by counsel, and have considered the same, and we are of opinion that *Emilia Sharp* is entitled to an estate in fee simple in all the freehold messuages, lands, tenements, and hereditaments devised by the said will of her late husband, *Thomas Sharp*, the testator, and to an estate in fee, according to the custom of the manor of *Ely Barton*, in the copyhold estate devised by the said will.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

J. B. BOSANQUET.”

(a) 4 Barn. & Cress. 667; *S. C.*
7 Dow. & Ryl. 112.

(b) 4 Barn. & Cress. 669.

(c) 2 New Rep. 214.

(d) 2 Atk. 102.

1830.

Saturday,
June 12th.

Where special bail have been put in but have omitted to justify, the Sheriff may put in fresh bail and render the defendant, even after an attachment has issued against him for not obeying a rule to bring in the body.

HAMILTON v. JONES, PITT, and Another.

TWO of the defendants in this cause, *viz.* *Jones* and *Pitt*, having been arrested, and their bail having omitted to justify, the Sheriff was ruled to bring in the body, and, on the expiration of that rule (on the 27th of *May*), an attachment issued against him. The Sheriff afterwards, without the knowledge of the two defendants, put in fresh bail for the purpose of rendering them.

Mr. *Pitt* now moved for a rule calling on the plaintiff to shew cause why he should not be discharged out of custody, on the ground that, by the practice of the Court, it was not competent to the Sheriff to put in fresh bail for the purpose of rendering a defendant, so long as the old bail-piece remained upon the file, for that then the original bail only could render; and that, at all events, the Sheriff was not at liberty to do so after an attachment had issued against him for contempt. He referred to *Edwin v. Allen* (a), where it was held that bail may, after an assignment of the bail-bond, render the defendant without justifying—*Rex v. The Sheriff of Essex* (b), where, on exception to bail, and notice given of other bail, only one of whom justified, the names of the former bail still remaining on the bail-piece, it was held that they might render the principal—*Fuller v. Prest* (c), where it was held, that, if a Sheriff's officer, upon an arrest, without the consent of the plaintiff, take an undertaking for the appearance of a party, instead of a bail-bond, and bail above is not duly put in, the Sheriff is liable to an action for an escape, and the Court will not relieve him by permitting him to put in and justify bail afterwards—and *Rex v. The Sheriff of*

(a) 5 Term Rep. 401. (b) Ibid. 633. (c) 7 Term Rep. 109.

Middlesex (a), where it was held, that, although added bail have been rejected, they are competent to render, and an attachment afterwards moved for is irregular.

[Mr. Justice *Park* referred to *Evans v. Swete* (b)].

Mr. *Pitt* also applied for a rule against the Sheriff's officer for extortion in demanding and receiving a sum of 1*l.* 8*s.* 6*d.*, on the arrest, which he contended was more than the fee allowed by law.

Lord Chief Justice TINDAL.—I am of opinion that the defendant *Pitt* has made out no case for the interference of the Court upon the first ground urged. He complains that he has been rendered by other bail than those first put in. By his affidavit it appears that these bail were put in by the Sheriff; and the only question is, whether, by the practice of the Court, the Sheriff be at liberty to put in fresh bail for his own security, for the purpose of rendering a defendant, after the first bail have omitted to justify, or have been rejected. There are several cases where he has been permitted to do so. In *Haggett v. Argent* (c), where the defendant refused to move that his bail might justify, till they had paid certain costs, the Court permitted them to justify on their own motion. The books of practice lay the rule down broadly, that the defendant may be rendered without justification. But, it has been contended that, at all events, the Sheriff was not in a situation to render the defendants at the time he did so, he being in contempt. That might be a good ground of objection to be urged on the part of the plaintiff. He, however, has not thought fit to make that objection, but has waived it; and therefore I see no reason why the Sheriff, a public officer, should not have extended to him every reasonable protection and indulgence. It appears

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(a) 1 Chit. Rep. 446.

(b) 2 Bing. 273.

(c) 2 Marsh. 365; S. C. 7 Taunt.

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to me, that the render was justifiable by the usage and practice of the Court. That portion of the rule, therefore, must be refused.

With respect to the charge against the officer for extortion, I do not now say whether the sum demanded was reasonable or not; as to that Mr. *Pitt* may take a rule to shew cause why it should not be referred to the Prothonotary to ascertain what the officer was entitled to, and why the surplus (if any) should not be returned to him.

The rest of the Court concurring—

Rule *nisi* accordingly.

Saturday,
 June 12th.

SAME v. SAME.

Where, of three defendants, two only are brought into Court, the plaintiff cannot regularly declare. The irregularity is, however, waived by their pleading.

THE defendant *Pitt* now moved for a rule *nisi* to set aside the declaration for irregularity. The irregularity complained of was, that, on the 13th *May*, a declaration *de bene esse* was delivered in the cause, two only of the defendants, *vis. Jones* and *Pitt*, being then in Court, the third defendant having only been *served* with process, and no appearance having been entered for him until the 4th *June*. He referred to *Knight v. Parker* (a), *Chapman v. Eland* (b), and *Moss v. Birch* (c), to shew that a declaration cannot be delivered against one of two defendants, till both appear; and also to the case of *Smith v. Painter* (d), where it was held that the plaintiff may deliver a declaration against the defendant conditionally, before the time for his appearing is past, and file common bail for him; but

(a) 2 Wm. Blac. 759.

(b) 2 New Rep. 82.

(c) 5 Term Rep. 722.

(d) 2 Term Rep. 719.

after that time he must bring the defendant into Court before he can declare.

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Lord Chief Justice TINDAL.—The objection proceeds on this ground—that the action is brought against three defendants, two of whom have been arrested, the third not, but brought into Court at a period subsequent to the delivery of a declaration *de bene esse*. If the case had remained on that footing, I should say that it was an irregularity; but the defendants have since pleaded, and that waives the irregularity; for, by pleading, the parties admit that all prior steps have been regularly taken. On that ground, therefore, the rule cannot be granted.

Mr. Justice GASELEE.—The conditional declaration becomes a declaration in chief when the condition is performed. The render in this case had that effect.

The rest of the Court concurring—

Rule refused.

LAFITTE v. SLATTER.

Saturday,
June 12th.

THIS was an action upon a bill of exchange for 315*l.* 16*s.* 10*d.*, dated the 18th *February*, 1829, drawn by the defendant, at four months' date, upon and accepted by one *Henry Tebbs*, and successively indorsed by the defendant to one *Magrath*, and by *Magrath* to the plaintiff, a banker at *Paris*.

The defendant drew a bill of exchange upon one *T.*, for the accommodation of one *R.*, who was considerably indebted to the plaintiff, and who procured *T.*'s acceptance:—*Held*, that the drawer was entitled to notice

At the trial before Lord Chief Justice *Tindal*, at the

of the dishonour of the bill, notwithstanding the acceptor had no assets of his in his hands, and had informed him, prior to the bill becoming due, that he would not provide for it—he having a reasonable expectation that it would be provided for by *R.*, and having a remedy over against him in case he was called upon to pay it.

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Sittings in *London* after last *Michaelmas* Term, the following facts appeared in evidence:—

One *Rose* being indebted to the defendant to the amount of 1,000*l.*, represented to him that *Tebbs* owed him (*Rose*) about 1,400*l.*, and requested the defendant to draw the bill in question upon *Tebbs*, which he (*Rose*) procured the latter to accept. Upon this evidence, it was contended, on the part of the plaintiff, that, this being an accommodation bill, the drawer was not entitled to notice of its dishonour—none having been given (*a*); and, to dispense with the necessity of notice, by shewing that the defendant *knew*, before the bill became due, that it would not be paid by the acceptor, a witness named *O'Meara* was called, to prove a conversation between the defendant and *Tebbs*, who had then left his abode, having got into difficulties through his transactions with *Rose*. The witness stated that the defendant, being uneasy about the bill in question, and another accepted under similar circumstances, applied to *Tebbs*, who said that he was in a most unfortunate situation in consequence of the misconduct of *Rose*; that he had not received value for the bill; and that he would not (or could not) pay it: upon which the defendant observed to him—"I understood you had value." *Tebbs* denied that he was indebted to *Rose*.

A verdict having been taken for the plaintiff, with liberty to the defendant to move to set it aside and enter a nonsuit—

Mr. Serjeant *Wilde*, accordingly, in *Hilary* Term last, obtained a rule *nisi*.—*Prima facie*, the drawer of a bill of

(*a*) The bill was due on the 20th *June* (the 21st being *Sunday*). On the 5th *July*, an attorney's letter was sent to the defendant demanding payment of the bill, which, independently of its being out of

time (about which there was some question), was contended by the defendant not to be equivalent to a notice, and so ruled by the Lord Chief Justice, and afterwards by the Court.

exchange is in all cases entitled to notice of its dishonour. To dispense with this notice, it is necessary for the plaintiff to establish, not merely that the drawee had no assets of the drawer; but he must also shew the circumstances under which the bill was drawn to be such that the drawer could in no event be damnified by the want of notice—that he has no remedy over against any other person—and that, at the time he drew the bill, he had no reasonable expectation that it would be provided for by any other person than himself. These principles are deducible from the whole current of authorities upon the subject; and the Judges have said that they would not carry the dispensation further than the decided cases had already carried it. There was no legal evidence that the drawee had not assets at the time the bill was drawn. Although it is evident, from the facts stated by the witness *O'Meara*, that, when he accepted the bill, *Tebbs* had no assets of the drawer; yet there was no proof that he had not assets of *Rose*. The mere statement by *Tebbs*, that he had not received value for the bill, was not evidence against the defendant or against any body else. In *Brown v. Mafsey* (a), where a bill was drawn, accepted, and indorsed by several indorsers, for the accommodation of the last indorser, and the acceptor had no effects of the drawer in his hands, but that fact was not known to the defendant, who was one of the prior indorsers—it was held that he was entitled to notice of the dishonour, before the holder could maintain an action against him, in order to enable him (even if he had no remedy on the bill) to call immediately on the last indorser, to whom he had lent the security of his indorsement, without value received, and who had in fact received the money upon that security. And in *Cory v. Scott* (b), where a bill was drawn and accepted for the accommodation of an indorsee, who, as well as the

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(a) 15 East, 216.

(b) 3 Barn. & Ald. 619.

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drawer, had no effects in the hands of the acceptor—it was held that a subsequent indorsee, in order to entitle himself to recover in an action against the drawer, was bound to give notice of the dishonour, as the drawer might have called upon the acceptor or the prior indorsee for payment, if he had had such notice. These cases, as well as those of *Claridge v. Dalton* (a), and *Norton v. Pickering* (b), are authorities to shew, that, where the drawer of a bill is so situated that he can have no reason at the time he draws the bill, to suppose that he is the party who will be called upon to pay it, he is entitled to notice of its dishonour; but that he is not entitled to notice where he knows that he alone is to provide for it. The intimation given in this case by the acceptor, before the bill became due, that he would not pay it, was not sufficient to dispense with notice to the drawer. It is clear that, in the case of the bankruptcy or insolvency of the acceptor, the fact of that circumstance being known to the drawer will not deprive him of his right to notice of non-payment. *Esdaile v. Sowerby* (c). So, in *Staples v. Okines* (d), it was held not to be enough to dispense with notice to the drawer, that there was an understanding between him and the drawee that he should provide for the bill.

Mr. Serjeant *Taddy*, in the last term, shewed cause.—No notice in fact was necessary. The only parties to the bill were the defendant, the drawer, *Tebbs*, the acceptor, and *Magrath* by whom it was indorsed to the plaintiff. As between these parties, it was clearly an accommodation bill. *Tebbs* was not indebted to the defendant; therefore he had no right to suppose that the bill would be taken up by him. But it is contended, that, because the defendant thought fit to imagine, either that *Tebbs* was indebted to *Rose*, or that *Rose* would fur-

(a) 4 Mau. & Selw. 226.

(c) 11 East, 114.

(b) 8 Barn. & Cress. 610.

(d) 1 Esp. Rep. 332.

nish *Tebbs* with funds to meet the bill, he was entitled to notice. The circumstances of *Rose* did not warrant such a supposition: he was insolvent, and had absconded. Independently, however, of that, the Court will not look beyond the parties to the bill. *Bickerdike v. Bollman* (a) is an express authority to shew that notice of dishonour need not be given to the drawer, where he has no effects in the hands of the drawee, either at the time of drawing the bill, or when it becomes due.

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Mr. Serjeant *Wilde*, and Mr. Serjeant *Russell*, in support of the rule.—To dispense with notice, it is not enough to shew that the acceptor had not assets of the drawer at the time the bill was drawn; the plaintiff should also have proved that the acceptor had not in his hands assets of any other person, in respect of which the bill was drawn. It was incumbent on him also to prove that the drawer could have no reasonable expectation that the bill would be paid by the acceptor; and also that he had no remedy over against any third party, so that he could sustain no injury by the want of notice. In *Rucker v. Hiller* (b), it was held, that, if the drawer have reasonable expectation of having assets in the hands of the drawee at the time the bill becomes due, he is entitled to notice. The case of *Bickerdike v. Bollman*, which has been always looked upon with disapprobation, was decided by two Judges only, and both of them agreed that the judgment might go upon another ground. Knowledge that the bill will not be paid by the acceptor is clearly not equivalent to notice. That is established in the cases of *Staples v. Okines*, *Whitfield v. Savage* (c), *Clegg v. Cotton* (d), *Esdaile v. Sowerby*, and *Cory v. Scott*. In *Rohde v. Proc-*

(a) 1 Term Rep. 405.

(c) 2 Bos. & Pul. 277.

(b) 16 East, 43; S. C. 3 Camp.

(d) 3 Bos. & Pul. 239.

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tor (a), where the drawer of a bill absconded and was made a bankrupt before the bill was due; and the holder knew of the appointment of the drawer's assignees before the bill was due, before which time the acceptor became bankrupt, and the holder neither gave nor made any attempt to give notice of the dishonour, either to the drawer or his assignees—it was held that he was guilty of *laches*, and that his claim against the drawer was barred, and, consequently, that he had no right to prove the bill under the drawer's commission. In the case of *Esdaile v. Sowerby*, Lord *Ellenborough* said: "As to knowledge of the dishonour by the person to be charged on the bill being equivalent to due notice of it given to him by the holder, the case of *Nicholson v. Gouthit* (b) is so decisive an authority against that doctrine, that we cannot enter again into the discussion of it:" and Mr. Justice *Bayley* said: "It was said in *Tindal v. Brown* (c), that notice means something more than knowledge." And in *Cory v. Scott*, Lord Chief Justice *Abbott* said: "That decision which substituted knowledge for notice, I have always regretted, because it introduced nice distinctions into the law, instead of adhering to a plain and intelligible rule. As I have always thought that it would have been better never to have considered knowledge as equivalent to notice, I cannot consent to carry the law one step further." In the present case, the facts shew that the defendant was not *prima facie* the person who was to provide for the bill; he had a reasonable expectation that it would be paid by another, and therefore he was entitled to notice. Besides, he being merely a surety for *Rose*, would in the event of his paying the bill have a remedy over against him, and consequently he had an interest in knowing whether or not the bill was dishonoured.

(a) 4 Barn. & Cress. 517; *S. C.*
 6 Dow. & Ryl. 610.

(b) 2 H. Blac. 610.

(c) 1 Term Rep. 167.

Lord Chief Justice TINDAL.—*Bickerdike v. Bollman* has always been considered as an excepted case. If, indeed, a bill be accepted for the accommodation of a drawer who has no assets in the hands of the acceptor, the drawer cannot be said to have received any damage from the want of notice. The case above alluded to being an excepted case, is not to be extended. In several cases, and particularly in that of *Rucker v. Hiller*, the principle seems to be laid down, that, if the drawer, although he have no assets in the hands of the acceptor, has reasonable ground to expect that the bill will be paid, he is entitled to notice. The question, therefore, in this case seems to be, whether, on the evidence given at the trial, it appears that the defendant, at the time he drew the bill, had reasonable ground to believe that either *Tebbs*, the acceptor, or some other person, would provide for it. There was evidence of a conversation between the defendant and *Tebbs*, before the bill had arrived at maturity, when the latter stated that he had not the means of taking it up, in consequence of the misconduct of *Rose*. *Rose* affirmed that *Tebbs* owed him 1,400*l.*, which *Tebbs* denied. From all the circumstances, we cannot infer other than that *Rose* was understood to be the person by whom the bill was to be provided for. If the bill had been paid by the defendant, he had a remedy against *Rose*, for whose benefit it was drawn. He was therefore clearly entitled to notice of the dishonour; and such notice not having been given, the rule which has been obtained for setting aside the verdict and entering a nonsuit, must be made absolute.

Mr. Justice PARK was at chambers, but, having heard the argument, before he left the Court he signified his concurrence with the opinion of the Lord Chief Justice.

Mr. Justice GASELEE, not having heard the whole of the argument, declined giving any opinion.

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Mr. Justice BOSANQUET.—I am also of opinion that the defendant in this case was entitled to notice of the dishonour of the bill. The general rule is so. *Bickerdike v. Bollman* is an exception, which the Courts have always lamented when brought before them. Where a bill is accepted for the accommodation of the drawer himself, he has no right to expect it to be paid by another; but, if he has a reasonable expectation that funds will be provided for it, either by the acceptor or by any other person, he ought to have notice. Had the defendant in this case any such reasonable expectation? It appears that the bill was not drawn for his accommodation; he lent his name in the expectation that *Rose* would provide for the bill, and under the impression that *Tebbs*, the acceptor, was largely indebted to *Rose*. It is evident, therefore, that this was not a bill of the same description as that in the case of *Bickerdike v. Bollman*. Upon the whole, it seems to me that, as the defendant had a reasonable expectation that the bill would be provided for, he was entitled to notice of its dishonour.

Rule absolute.



Tuesday,
June 15th.

ROWE v. SOFTLY.

The defendant, on his arrest, deposited in the hands of the Sheriff the amount of the debt, and 10*l.* for costs, in pursuance of the statute 7 & 8 Geo. 4, c. 71, s.

A RULE nisi was obtained by Mr. Serjeant *Andrews*, in the earlier part of the last term, on behalf of the plaintiff, for taking out of Court money paid in by the defendant. The circumstances of the case were as follow:—

The defendant was arrested on the 8th *May* last, upon process returnable on the 9th—*Sunday*. He accordingly,

2. The time for putting in special bail expired on the 14th *May*, the time for perfecting, on the 18th:—*Held*, that the defendant had until the latter day to avail himself of the provision of the statute, by making an additional deposit of 10*l.* in lieu of special bail.

Quære, whether the plaintiff is entitled to move to have the sum deposited in the hands of the Sheriff and paid into Court, paid out to him until he has obtained judgment.

in pursuance of the statute 7 & 8 Geo. 4, c. 71, s. 2, paid into the hands of the Sheriff 21*l.*, the amount of the debt for which the action was brought, together with 10*l.* for costs. On the 10th *May*, the Sheriff was ruled to return the writ. The sums so deposited in the Sheriff's hands were afterwards by him paid into Court. The time for *putting in* special bail would expire on the 14th *May*, and the time for *perfecting*, on the 18th. On the 17th, the defendant paid into Court the additional sum of 10*l.*, as a further security for the costs, to abide the event of the suit, and entered a common appearance; of which the plaintiff had notice. On the same day, *viz.* the 17th *May*, but before the plaintiff received the above notice, this rule was obtained for taking out of Court the money deposited with the Sheriff in lieu of a bail-bond, on the ground that no special bail had been *put in*, the time for so doing having then expired.

Mr. Serjeant *Adams*, on a subsequent day, shewed cause.—The enactment in question now comes to be interpreted for the first time. It provides for two cases—*first*, where a defendant is arrested, and has deposited the required sums in the hands of the Sheriff, in lieu of entering into a bail-bond—*secondly*, where he has given a bail-bond, or has remained in custody: in either case, the party may, on payment into Court of the amount of the debt, with an additional 10*l.*, or 20*l.*, as the case may be, avoid the necessity of putting in and perfecting special bail. The clause further provides, that, in case judgment shall be given for the plaintiff, he shall be entitled, by order of the Court, upon motion made for that purpose, to receive out of Court the money so deposited; but, in no case was it intended that the plaintiff should be enabled to take out of Court the money deposited with the Sheriff *until he had obtained a judgment*. The defendant himself would not have been entitled to receive the deposit out of Court.

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until the expiration of the time for *perfecting* special bail. Consequently, the plaintiff could not at all events be in a situation to move before that time.

Mr. Serjeant *Andrews*, in support of his rule.—The act in question was passed for the benefit of the subject. It does not repeal, but extends the provisions of the 43 *Geo.* 3, c. 46. In this case, special bail not having been *put in*, it clearly could not be *perfected*; consequently, the defendant has failed to comply with the directions of the statute. The time has gone by, and he is now estopped from taking advantage of its provisions.

It having been suggested that the point was under consideration in the Court of *King's Bench*, the Lord Chief Justice intimated a wish to speak with the Judges of that Court. The case accordingly stood over until the present term.

Lord Chief Justice TINDAL.—The plaintiff, by this motion, seeks to obtain out of Court the amount of the debt for which this action was brought, together with 10*l.* for costs, paid by the defendant into the hands of the Sheriff, upon his arrest, in lieu of a bail-bond, in pursuance of the statute 7 & 8 *Geo.* 4, c. 71; and the question to be considered is, whether the defendant was in time for giving notice of his intention to avail himself of the alternative provided by the act, *viz.* to allow the sums paid into the hands of the Sheriff to remain in Court to abide the event of the cause, instead of putting in and perfecting special bail. The plaintiff contends that this notice should have been given on or before the day for *putting in* bail. The time for *putting in* special bail expired on the 14th *May*, the time for *perfecting*, on the 18th. The point depends upon the construction of the second section of the statute, which extends the provisions of the statute 43 *Geo.* 3, c.

46, therein recited (whereby a defendant was enabled on his arrest to pay money into the hands of the Sheriff in lieu of entering into a bail-bond), to the case of bail above. That section enacts, "that, in all cases in which any defendant shall have been discharged from arrest upon making such deposit as is required by the said recited act (43 Geo. 3, c. 46), and the sum so deposited shall have been paid into Court, it shall be lawful for such defendant, instead of *putting in and perfecting* special bail in the action, according to the course of practice of the Court, to allow the sum so deposited with the Sheriff, and by him paid into Court as aforesaid, together with the additional sum of 10% to be paid into Court by such defendant as a further security for the costs of the action, to remain in the Court to abide the event of the suit; and in all cases where any defendant shall have been arrested and shall have given bail to the Sheriff, or shall have been arrested and remain in custody, it shall be lawful for such last-mentioned defendant, instead of putting in and perfecting special bail, to deposit and pay into the said Court the sum indorsed upon the writ, together with the amount of the King's fine (if any) upon the original writ, and the further sum of 20% as a security for the costs of the action, there to remain and abide the event of the suit: And thereupon the said defendant may, and he is hereby required to enter a common appearance, or file common bail in the action, within such time as he would have been required to have *put in and perfected* special bail in the action according to the course of the said Court, or in default thereof the plaintiff in the action is hereby empowered to enter such common appearance, or file common bail for the said defendant, and the cause may proceed as if the defendant had put in and perfected special bail: and, in case judgment in the said action shall be given for the plaintiff, he shall be entitled, by order of the Court, upon motion made for that purpose, to receive

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the said money so remaining in, or so deposited or paid into Court as aforesaid, or so much thereof as will be sufficient to satisfy the sum recovered by the judgment, and the costs of the application: and if judgment be given in the said action for the defendant, or the plaintiff discontinue his suit, or otherwise be barred, or in case the sum deposited in Court be more than sufficient to satisfy the plaintiff, the said money so deposited or paid into Court, or so much thereof as shall remain, shall, by order of the Court, upon motion to be made for that purpose, be repaid to such defendant." It appears to us that the words of this clause—"instead of *putting in and perfecting* special bail in the action, &c."—comprehend the whole of the time within which, according to the course of practice of the Court, the bail ought to be *perfected*. This construction can occasion no delay to the plaintiff, for he could not declare in chief until the bail was perfected. The intention of the statute was to operate a benefit to the defendant. It was not intended that the plaintiff should take the money out of Court until the cause had been tried; it was intended that it should remain there as a stake. The time for *perfecting* special bail in this case not expiring till the 18th *May*, we think the defendant had till the end of that day, to take advantage of the course pointed out by the statute; and as he did before that day comply with the provisions of the enactment, we think this rule ought to be discharged.

Rule discharged (a).

(a) By section 3, a defendant is enabled, after he has made his election to make the deposit in lieu of bail, before issue joined, to take the money out of Court, on putting in and perfecting special

bail; and by section 4, he may, after having perfected special bail, if the Court shall so think fit, discharge the bail by making the required deposit.

1830.

SMITH and Others, Assignees of COOKE, a Bankrupt, v.
CAMPBELL, SHOULS, and COOPER.

Tuesday,
June 15th.

A rule *nisi* was on a former occasion obtained by Mr. Serjeant *Wilde*, on the part of the defendant *Cooper*, calling on the plaintiffs to shew cause why the Prothonotary should not review his taxation. The circumstances of the case were as follow:—

The action was brought against three defendants, upon a joint undertaking; two of them, *vis. Campbell* and *Shouls*, pleaded together, the third, *Cooper*, defended separately by another attorney. The plaintiffs had given a notice of trial which was afterwards countermanded, the briefs for the defence having been previously prepared. A second notice of trial was afterwards given, but *Cooper* having in the interim become insolvent, his attorney refused to attend for him; consequently only two of the defendants appeared at the trial. A verdict was found for the defendants generally, and judgment was afterwards signed, and the costs of *Campbell* and *Shouls* taxed and paid by the plaintiffs. The object of the present motion was that the Prothonotary might be directed to tax and allow costs to *Cooper*.

In a joint action of *assumpsit* against three defendants, two of them pleaded together, and the third by another attorney. The two former only appeared at the trial, and a verdict having been found for the defendants generally, judgment was signed and costs taxed by these two, and paid by the plaintiffs. The Court, on the motion of the third defendant, refused to direct the Prothonotary to review the taxation, and allow his costs.

Mr. Serjeant *Taddy* now shewed cause.—He submitted that *Cooper's* attorney ought to have attended at the time the costs of the other defendants were taxed; and that, as he had failed to do so, he could not now call upon the Court to review and alter a judgment that had already been satisfied.

Mr. Serjeant *Wilde*, in support of his rule, contended that the defendant ought not to be deprived of the benefit of the judgment, merely in consequence of the inadvertence or misconduct of his attorney.

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SMITH
v.
CAMPBELL.

Lord Chief Justice TINDAL.—If the defendant *Cooper* had exerted himself, he had an opportunity to obtain the taxation of his costs. The two other defendants have obtained theirs. It is in vain now to ask the Court to alter the judgment; for, that would prejudice the plaintiffs, and we have no right to make them liable a second time to the consequences of a judgment which they have once satisfied. I think we ought not to interfere. If the defendant *Cooper* has any remedy, it must be against his own attorney.

The rest of the Court concurring—

Rule discharged.

Tuesday,
June 15th.

STRANGE v. WIGNEY.

The plaintiff, in journeying from *Tonbridge* to *London*, placed a 100*l.* bank-post bill in her reticule which hung on her arm. Arrived at *Smithfield*, she left the reticule in a hackney-coach. Upon discovering her loss, she made application at the Hackney-coach office in *Essex Street*, and caused hand-bills to be circulated at all the coach-stands, and at

THIS was an action of trover for a bank-post bill for 100*l.*, indorsed in blank, which had been lost by the plaintiff, and had come to the hands of the defendant under the following circumstances:—

About the middle of *September*, 1829, the plaintiff was journeying from *Tonbridge* to *London* with the bill in question deposited in a reticule which hung on her arm. On her arrival in *Bridge Street, Blackfriars*, she got into a hackney-coach, and proceeded to a house in *Smithfield*, where she alighted and had her luggage taken in. Shortly afterwards she discovered that her reticule had been left in the coach. Finding that the coach was gone, she, by the advice of a friend, went to the Hackney-coach of-

the adjoining public-houses; and also once advertised the loss in a daily paper. On the morning of the day on which the last-mentioned advertisement appeared, the bill in question was cashed by the defendant, a banker at *Brighton*, for a stranger, of whom no questions were asked, except his name and address, which he wrote on the back of the bill in a vulgar manner, and which afterwards proved to be fictitious. It was left to the Jury to say—*first*, whether the plaintiff had used due and proper caution in her mode of conveying the bill—*secondly*, whether she had exercised a proper degree of diligence in the steps she had taken to make known to the world her loss—*thirdly*, whether the defendant himself had exercised proper caution in receiving a bill of such large amount from a total stranger, without making some inquiry as to where he put up, or whether he was known to any person at *Brighton*. The Jury having found for the plaintiff—*The Court* refused to disturb the verdict.

fice, in *Essex Street, Strand*, to make known her loss. The people at the office told her she need not take any steps for the recovery of the bill for three days, within which time they had no doubt but that the reticule would be brought there. The plaintiff, however, immediately caused hand-bills, describing the property, and offering a reward for its restoration, to be printed and circulated at all the coach-stands and adjacent public-houses; and, on the 24th *September*, caused an advertisement to the like effect to be inserted in the *Morning Advertiser*.

Early on the morning of the 24th *September*, the bill was presented at the banking-house of the defendant, at *Brighton*, for the purpose of being cashed, by a person who was a stranger to the defendant, and who stated that he was on his way to *Southampton* and the *Isle of Wight*, when a clerk of the defendant gave cash for the bill, receiving the usual commission, without making any inquiry of the person who presented it, beyond asking for his name and address, which he wrote upon the back of the bill—"Mr. *W. Wilson*, 16, *Queen Street, Lincoln's Inn Fields*"—in a very illiterate stile. This name and address were fictitious.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall* after the last term, when it was objected, on the part of the defendant, that the plaintiff was not entitled to recover, inasmuch as she had not used due caution in the conveyance of the bill, nor exercised due diligence in making known her loss after it had happened, for that the advertisement put into the *Morning Advertiser* on the same day that the bill was taken by the defendant, could not possibly have conveyed to them any notice of the loss.

His Lordship, however, left it to the Jury to say—first, whether the plaintiff had used due and proper caution in her mode of conveying the bill—secondly, whether she had exercised a proper degree of diligence in the steps

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she had taken to make known to the world her loss—thirdly, whether the defendant himself had exercised proper caution in receiving a bill of such large amount from a total stranger, without making some inquiry as to where he put up, or whether he was known to any person at *Brighton*.

The Jury, after a short consultation, returned a verdict for the plaintiff.

Mr. Serjeant *Taddy* now moved for a rule *nisi* that this verdict might be set aside and a new trial had.—The steps taken by the plaintiff to make known her loss were not such as were calculated to give notice to commercial men, or to those who were likely to receive such an instrument. The single advertisement inserted in the *Morning Advertiser* could not possibly have reached the defendant at the time he received the bill. The conduct of the defendant is perfectly immaterial, unless it be shewn that the plaintiff herself used due diligence both in the conveyance and custody of the note, and in publishing its loss when that event happened. The plaintiff in this case has done neither; for, a reticule was not a proper place for the deposit of a note of such value; neither were the means used by her for the purpose of informing the world of her loss such as were in the remotest degree likely in due time to reach the defendant. The earlier cases on this subject laid down a rule that was intelligible to commercial men, *viz.* that bank-bills carry their title with them, and are to be considered as money, the property in them passing from hand to hand by delivery. In *Miller v. Race* (a) it was held that a bank-note, though stolen, becomes the property of him who gives a valuable consideration for it, having no notice or knowledge of the robbery. Lord *Mansfield* there said: “Here, an inn-keeper took the note

(a) 1 Burr. 452; S. C. 2 Ld. Ken. 189.

bond fide in his business, from a person who made the appearance of a gentleman. There is no pretence or suspicion of collusion with the robber; for, this matter was strictly inquired and examined into at the trial, and is so stated in the case—‘that he took it for a full and valuable consideration, in the usual course of business.’ Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a bank-note for 1,000*l.*, it might have been suspicious; but this was a small note, for 21*l.* 10*s.* only, and money given in exchange for it.” The like rule was laid down in *Grant v. Vaughan* (a). In *Lawson v. Weston* (b), the defendant, having lost a bill, caused an advertisement of the fact to be inserted in the newspapers; the plaintiffs discounted the bill for the person who found it—it was held that they were entitled to recover on the bill, they having received it *bond fide*, and without notice of the fraudulent manner in which it had been obtained by the party from whom they took it. Lord *Kenyon* there said: “If there was any fraud in the transaction, or if a *bond fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but, to adopt the principle of the defence to the full extent stated, would be at once to paralyze the circulation of all the paper in the country. The circumstance of the bill having been lost might have been material, if the defendant could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for 10*l.* as for 10,000*l.*” In *Snow v. Peacock* (c), the note was for a

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(a) 3 Burr. 1516; S. C. 1 Wm. Blac. 485.

(b) 4 Esp. Rep. 56.

(c) 11 J. B. Moore, 286; S. C. 3 Bing. 406.

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very large sum—500*l.* The robbery was duly advertised in the *Hue and Cry Gazette*, and also in another paper; and the defendants took the note at their banking-house, at a little village in *Lincolnshire*, for the mere purpose of passing off their own notes. In that case there was no negligence on the part of the plaintiff. Lord Chief Justice *Best* there said (a): “There was no ground for suspecting for a moment that the defendants’ clerk had been actuated by any dishonest or undue motives, and the defendants themselves knew nothing whatever of the transaction. The clerk was, in all probability, anxious to get his employers’ notes into circulation; and that anxiety put him off his guard, and prevented his making respecting the person who offered him the note, that inquiry which he should have made.” In *Snow v. Sadler* (b), the note (a bank-note for 30*l.*) passed at *Doncaster Races*—it was received by the defendant in payment for bets on the course; and the Court seem to have considered that that circumstance, together with the smallness of the amount, would justify a lesser degree of caution than would be required to be used by a tradesman. These two latter cases proceeded very much upon the same principle as *Gill v. Cubitt* (c). In that case, a bill of exchange which had been stolen in the course of the night, was taken early on the following morning to the office of a discount broker, by a person whose features were, but whose name was not, known to the broker; and the latter, being satisfied with the name of the acceptor, discounted the bill, according to his usual practice, without making any inquiry of the person who brought it. In an action on the bill (by the broker against the acceptor), the Judge directed the Jury to find for the defendant, if they thought that the broker had

(a) 11 J. B. Moore, 295.

(c) 3 Barn. & Cress. 466; S. C.

(b) 11 J. B. Moore, 506; S. C. 5 Dow. & Ryl. 324.

3 Bing. 610.

taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. The Jury having found for the defendant, the Court afterwards refused to disturb the verdict. Can it be said in the present case that this note was taken by the defendant under circumstances calculated to excite the suspicion of a prudent and careful man? A note for 100*l.* is not an unusual sum for a person to have in his possession at a frequented watering place. In *Beckwith v. Corral* (a), the plaintiff was robbed of a pocket-book containing (amongst other things) a bill of exchange for 332*l.* In advertising the loss, he merely stated that the pocket-book contained "papers of no use to any person but the owner." The bill was shortly afterwards presented at the banking-house of the defendants, by a stranger, who stated that he was the son of the indorser. The defendants discounted it. In trover, the Judge left it to the Jury to say—*first*, whether they thought that the plaintiff had done all that his duty required of him, in advertising and making known his loss—*secondly*, whether, if due diligence had been used by the plaintiff in this respect, the defendant had acted *bond fide*, and used due caution, in receiving the bill: telling them, that, if they were of opinion that the plaintiff had failed in giving proper notice of the robbery, the defendants were entitled to a verdict. The Jury having found for the defendants, the Court refused to disturb the verdict; saying—"If, in this case, the plaintiff had used due diligence, and had given proper notice of the loss of the bill in question, the defendants might have been presumed to have been apprised of that fact. Where a person loses, whether by accident or robbery, a negotiable security, he should, before he can be entitled to recover it in an action of this nature, be prepared to shew that he has done all that could be required on his part to

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(a) 11 J. B. Moore, 335; S. C. 3 Bing. 444.

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make known his loss, and that the party who has received it, has, in so doing, failed in observing due caution. The defendants in this case received the bill *bond fide*; there is nothing to shew that they received it improperly, or to fix them with a knowledge of the loss of it by the plaintiff. The only notice the latter gave of his loss, was, an advertisement, which would rather have the effect of misleading the world, than of giving the requisite information; for, it only stated that the pocket-book contained papers of no use to any person but the owner. The plaintiff, therefore, had failed to use proper diligence in making known his loss. He should have described the bill properly in his advertisement, and thus have put people on their guard." In the present case, nothing was done on the part of the plaintiff that could in any degree put the defendant upon his guard, or convey to him any notice of the loss of the bill in question. The general rule in these cases is, that there must be fraud or suspicion of fraud or collusion in the party receiving the note or bill, in order to render him liable to refund it. Gross negligence may in some instances warrant a Jury in inferring suspicion. If the defendant did not exercise any great degree of caution, it was because the plaintiff took no pains to convey to the world that information which would have excited caution.

Lord Chief Justice TINDAL.—If any complaint had been made as to the mode in which the case was left to the Jury, I should have been most anxious to have the case re-considered. But I do not learn that there is any objection to the charge. I told the Jury that there were three points for their consideration. The *first* point was, whether the plaintiff had used due care and caution in the conveyance of her property. It was strongly urged on the part of the defendant, that she took so little care that the loss ought not to be charged upon him; and that the note

in question would have been safer in her trunk than in her reticule, where she had deposited it. The event proved that it would have been so. I observed to the Jury that the note was perhaps more likely to be safe in the reticule, which the plaintiff carried on her arm, than in the trunk. The question was fairly left for their consideration, as also, whether the circumstances which led to the loss, were such as ordinarily might have occurred. If the Jury found that there was no original want of care on the part of the plaintiff, then I told them they were to consider the *second* point, *viz.* whether she had used due diligence in making her loss known. That was the principal point. It was insisted that the defendant ought to have advertised her loss. I told the Jury, that, although that might be a very good method of making known a loss, yet that there was no law to compel a party to advertise; and that the whole circumstances of the case must be impartially weighed to ascertain whether the defendant had fairly and honestly used means to make public the loss of the note. It appeared that she went, by the advice of a friend, to *Essex Street*, to the office of the commissioners of hackney-coaches, where she was told that she need make no effort for three days, as there was no doubt but that the lost property would be brought there. Notwithstanding this, she caused hand-bills to be printed and left at all the hackney-coach stands. It was for the Jury to say whether she had not done enough. The *third* point left was, whether there had been any want of caution on the part of the defendant in taking the note. Upon this point it was contended that bankers could not, under such circumstances, make minute inquiries without running the risk of giving offence to their customers. That would necessarily depend upon the mode of conducting the inquiry. No honest man could take offence at being questioned with proper civility. The defendant might, at all events, have asked the person who presented the note, whether or not he was known to any one at *Brighton*.

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But, so far from making any such inquiry, he did not even ask at what inn he put up. The individual wrote upon the back of the note a name and address which turned out to be false. The hand-writing was not such as might be supposed to be that of a man in a rank of life likely to have honestly in his possession a note of so large a value. The note was handed up to the Jury, and they were called upon to say whether the appearance of the writing was not such as should have challenged further inquiry. The whole case was one solely for the discretion of the Jury. I am not disposed to say that there ought to be a new trial.

Mr. Justice PARK.—The three propositions were properly submitted to the Jury. The whole were questions of fact, and I see no ground for setting aside the verdict. Full weight was given to the first point. It is not possible to say what particular mode of conveyance is the most proper for bills or notes. The two latter, however, were the main points. It appears that, upon discovering her loss, the defendant went to *Essex Street*, to the coach-office, where she was advised to wait for three days before she made any attempt to recover the note. Her anxiety was such that she, in the interim, caused hand-bills to be printed and distributed. No negligence can therefore be imputed to her. The question then is, whether the defendant used due caution in taking the note from a man who was a total stranger to him, and a note, too, of the value of 100*l*. That, undoubtedly, would not be a large sum to be negotiated at a frequented watering place by a person of a respectable rank in life. But this person seems to have written his name and address in a vulgar hand, and in a very bungling stile. He might have been asked at what hotel he put up, or whether he knew or was known to any individual at *Brighton*. It certainly would not be improper for a banker to ask such questions. I am decidedly

of opinion that there was sufficient on the evidence to warrant the Jury in finding for the plaintiff.

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Mr. Justice GASELEE.—The case was solely for the consideration of the Jury, and was properly left to them, and therefore the verdict ought not to be disturbed.

Mr. Justice BOSANQUET.—I am also of opinion that the verdict ought not to be disturbed. No fault can be found with the mode in which the case was sent to the Jury. Three questions were left to them fully, and as favourably for the defendant as consistently could be. I am not prepared to say, that, because there happens to have been some degree of negligence on the part of the loser of a note, he is therefore to be precluded from recovering it from a person to whose hands it has come, and who has received it without due caution or inquiry. As to the other points, the degrees of diligence or negligence must depend upon the particular circumstances of the case, and the nature of the loss. In the present case, it appears that the plaintiff made application at the hackney-coach office in *Essex Street*, and, in order to make her loss known to persons connected with hackney-coaches, caused hand-bills to be printed and circulated at all the coach-stands. With respect to the degree of caution exercised by the defendant, all the circumstances of the case were fully and fairly brought under the consideration of the Jury. They have therein exercised a discretion, and I am not prepared to say an unsound one.

Rule refused (a).

(a) And see *Peacock v. Rhodes*, 2 Doug. 638; *Solomons v. The Bank of England*, 13 East, 135, and the M. S. note of that case cited by Mr. Justice Burrough, in *Snow v. Peacock*, 11 J. B. Moore, 302; and *Down v. Halling*, 4 Barn. & Cress. 330; S. C. 6 Dow & Ryl. 455.

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Tuesday,
June 15th.

Where a witness remains in Court after an order has been made requiring all witnesses to retire, it is in the discretion of the Judge at *Nisi Prius* to admit or reject his testimony, according to circumstances.

PARKER v. M'WILLIAM and Wife, Administratrix of
HORSEFALL.

THIS was an action of *assumpsit* to recover from the defendants a sum of 200*l.* alleged to have been deposited by the plaintiff in the hands of one *Elizabeth Horsefall*, who died intestate, and to whose effects the wife (the intestate's sister) had administered.

The case on the part of the plaintiff was, that the 200*l.* had originally been given by Miss *Horsefall* to the plaintiff, and that the latter had requested her to keep it for her.

At the trial before Lord Chief Justice *Tindal*, at the Sittings at *Westminster* after the last term, before the case was opened, an order was made for the exclusion of all the witnesses. All obeyed this order except one individual, who was the principal witness on the part of the plaintiff, and who was called for the purpose of proving the fact of the deposit. On his entering the witness-box, it was objected, on the part of the defendant, that his evidence was not admissible, on the ground of his having remained in Court in disobedience of the order of the Judge. The witness, being questioned, stated that he had not heard the order pronounced; and, to a question put by his Lordship, who addressed him in a very low tone of voice, he denied having heard, either the order to withdraw, or the opening speech of the plaintiff's counsel (wherein were detailed with extreme minuteness the facts relied upon), assigning for reason, that he was very deaf.

Ultimately the testimony of this witness was received; and, three others proved, that the intestate had, on various occasions, told them that she had made the plaintiff a present of the 200*l.*, and that the latter had requested her to retain it for her, which she had at first declined, but afterwards assented to do.

The Jury thereupon returned a verdict for the plaintiff.

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Mr. Serjeant *Wilde* now moved for a rule *nisi* that this verdict might be set aside, and a new trial had, on the objection taken at the trial.—He referred to the case of *The Attorney-General v. Bulpit* (a), where the Court of *Exchequer* refused to grant a new trial, where a person (not originally intended to be examined) who was in Court, and who had been there during the trial, was called to give evidence, and was not allowed to be examined, on that ground. The Court there said: “It is a sacred and inflexible rule, that, wherever there is an order of the Court that the witnesses intended to be examined on either side shall remain out of Court during the examination of the other witnesses, if any person who may give material evidence be present, contrary to that order, he cannot, on any account, be permitted to be examined.” And he contended that, whether the witnesses were excluded from Court by virtue of a general rule, as in the Court of *Exchequer*, or merely by a rule pronounced in the individual case, the order ought to be adhered to with equal inflexibility.

Lord Chief Justice TINDAL.—The rule laid down in the Court of *Exchequer* with respect to the exclusion of witnesses not under examination, is one that has obtained there for many years, and is well known to be the practice of that Court. The witnesses on both sides are ordered out of Court during the progress of the cause. That practice was first introduced chiefly with a view to the fairness of the proceedings in actions at the suit of the Crown. There is no such general order in either of the other Courts; but, where a special order to that effect is made, it must depend upon the particular circumstances of the

(a) 9 Price, 4.

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case, whether a witness who does not obey the order is permitted to be examined or not. In the present instance, when the witness in question was called, and an objection taken to his being allowed to give evidence, I asked him whether he had heard the opening speech of the learned Serjeant; he said he had not, assigning for reason, that he was very deaf, although he afterwards readily answered all questions that were put to him. The circumstances of his remaining in Court, and of his alleged deafness, were very fully observed upon by counsel, and the Jury would have withdrawn their credit from him if they had thought fit. It did not appear at the time that the witness was contumacious, or had acted with any sinister design to evade the order of the Court, which he possibly might not have heard. It may be observed, too, that one principal object of ordering all the witnesses out of Court, is, that they may not have an opportunity of conferring together, and, by concert, shaping their testimony according to the statements of counsel. We must look also to the other evidence in the cause. There were three other witnesses, one of whom had been in the service of the intestate; they all concurred in saying that they had, at different times, heard Miss *Horsefall* say that she had made the plaintiff a present of a sum of 200*l.*, which the latter had placed in her hands to keep for her; and that she said that at first she had declined to keep it, but afterwards assented. The testimony of the first witness, who spoke to the actual deposit, was certainly very important; but, independently of his evidence, there was a strong case for the Jury, and I am not prepared to say, that, upon the evidence of the other three witnesses only, they would not have arrived at the same conclusion. Besides, it would be difficult to deal with the first witness on a second trial. Upon the whole, therefore, I am of opinion that the verdict ought not to be disturbed.

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Mr. Justice PARK.—I do not enter into any discussion as to the propriety of establishing in common law cases a rule similar to that observed in those affecting the revenue. It might be a wise and judicious course. In the case of *The Attorney-General v. Bulpit*, the Court of *Exchequer* said they could not interpose, because the rule there was inflexible, in order to protect the subject against the influence of the Crown. Here, however, there is no such inflexible rule; and although the remaining in Court in disobedience of the order of the Judge might be a contumacious act on the part of the witness, still that would hardly of itself warrant us in sending the cause down for a new trial. If an attorney is contumacious, or otherwise misconducts himself, though he may be liable to punishment, yet the interests of the client are not therefore to be prejudiced. In the case of this witness, it is probable that no contumacy was intended. The witness might have been deaf, as he represented: he swore that he neither heard the order for the exclusion of the witnesses, nor the opening speech of the plaintiff's counsel. The whole matter was before the Jury, and I see no ground for us to interpose.

Mr. Justice GASELEE.—It does not appear to me that this is a case in which the Court is called upon to interfere. The order for the witnesses to withdraw having been made by the Judge at *Nisi Prius*, it was for him alone to consider whether that order might be conveniently relaxed. Whether or not he would think fit to do so, must depend upon the peculiar circumstances of the case; and the evidence of the party, if admitted, would go to the Jury subject to such observations as might suggest themselves. The witness might have remained in Court without any intention of acting contumaciously. I think the question was one solely within the discretion of the Judge. It is purely a question of *Nisi Prius* practice.

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There might have been some ground for granting a new trial, if it had clearly appeared that the Jury had given an improper degree of credit to the particular witness; but that does not seem to have been the case here.

Mr. Justice BOSANQUET.—As there is no such general rule in this Court, touching the exclusion of witnesses from the Court, as that which obtains in the *Exchequer*, I think the admission or rejection of the testimony of a witness who disregards such an order made in a particular case, must rest in the discretion of the Judge, guided by circumstances. Upon the whole, I think no injustice will be done in this case by allowing the verdict to stand.

Rule refused.

Wednesday,
June 16th.

WELSH v. ROSE.

The plaintiff being desirous of taking apartments of one B., but not willing to do so unless the defendant, the superior landlord, would relieve him from the risk of having his goods distrained for B.'s rent, the defendant engaged, that, as long as the plaintiff paid B. his rent, he (the defendant) would never trouble the plaintiff or his property. The

THIS was an action of trespass, for breaking and entering the plaintiff's rooms, &c., and taking his goods.

The defendant pleaded, that one *John Barrett*, for a long time, to wit, for the space of one year next before and on the 25th *November*, 1829, and from thence until and at the said times when &c., held and enjoyed, amongst other premises, the said rooms and apartments, pig-stye, and yard, in which &c., as tenant thereof to the said defendant, under and by virtue of a certain demise thereof theretofore made, at and under a yearly rent of 18*l.*, payable monthly, that is to say, on the 25th day of each and every month in the year, by even and equal portions; that, on the said 25th *November*, in the year aforesaid, a large sum

plaintiff accordingly entered, but failed in the due payment of his rent:—*Held*, that the landlord's right of distress was not taken away, notwithstanding that the plaintiff had, before the distress made, tendered to B. the balance of rent due to him.

of money, to wit, the sum of 10*l.* 10*s.* of the rent aforesaid, for seven months, ending on the said 25th *November*, became and was due and payable from the said *John Barrett* to the said defendant, and at the said times when &c. was in arrear and unpaid: wherefore the said defendant, on the said day when &c., did enter into and upon the said rooms, apartments, pig-stye, and yard, in which &c., and took, &c. &c.

The plaintiff replied, that, before and at the time of the application to the defendant, and his giving the assurance and making the promise hereinafter next mentioned, the said *John Barrett* held and enjoyed certain premises, with the appurtenances, as tenant thereof to the defendant, and that the said rooms and apartments and yard in which &c., were part and parcel of the said premises so held and enjoyed by the said *John Barrett* as tenant thereof to the defendant; that the plaintiff, being minded and desirous to take and hire the said rooms and apartments and yard in which &c., of the said *John Barrett*, and to become tenant thereof to the said *John Barrett* at and under a certain rent theretofore payable by the plaintiff to the said *John Barrett* for the same, but being apprehensive that the said *John Barrett* then was or might thereafter become indebted to the defendant for the rent of the whole of the premises, with the appurtenances, whereof the said rooms and apartments and yard in which &c., and which the plaintiff was so minded and desirous to hire and take of the said *John Barrett*, were parts and parcel as aforesaid, and that, if the said *John Barrett* was or should become indebted to the defendant for rent as aforesaid, the cattle, goods, and chattels of him the plaintiff which he might bring into and upon the said rooms and apartments and yard in which &c., if he hired and took the same of the said *John Barrett*, might be seized and taken by the defendant as a distress for any rent which might be or might become due

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and in arrear from the said *John Barrett* to the defendant for rent of the whole of the premises so held by the said *John Barrett* as tenant thereof to the defendant as aforesaid, and being unwilling to expose such his cattle, goods, and chattels to be taken as a distress for such rent as last aforesaid, or to become tenant to the said *John Barrett* without being assured and satisfied that such his cattle, goods, and chattels would not be taken as a distress for such rent as last aforesaid, before he took and hired the said rooms and apartments and yard in which &c., and before the said time when &c., to wit, on the 25th *May*, 1829, to wit, at &c., applied to the defendant, as landlord of the said *John Barrett*, of the whole of the said premises whereof the said rooms and apartments and yard in which &c. were parts and parcel as aforesaid, and informed him that he was minded and desirous to hire and take the said rooms and apartments and yard in which &c. of the said *John Barrett*, but was unwilling to do so if he were liable, or his cattle, goods, and chattels could be taken as a distress for the rent of the said *John Barrett* to the defendant; whereupon the defendant then and there, before he the plaintiff took or hired the said rooms and apartments and yard of the said *John Barrett*, and long before the said time when &c., to wit, on &c., at &c., assured and promised the plaintiff, that, as long as he, the plaintiff, paid to the said *John Barrett* the rent which should become due from him to the said *John Barrett*, for the said rooms and apartments and yard which he was so minded and desirous to hire and take of the said *John Barrett* as aforesaid, and which were and are the rooms and apartments and yard in which &c., he the defendant would never trouble the plaintiff or his property; that he, the plaintiff, relying on and confiding in the said assurance and promise of the defendant so with him made as aforesaid, did, afterwards, and long before the said time when &c., to wit, on &c., at &c., hire and take the said rooms

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and apartments and yard in which &c., so being parts and parcel as aforesaid, of the said *John Barrett*, and became, and at the same time when &c. was, tenant to the said *John Barrett* of the same, and after he so became, and whilst he was tenant to the said *John Barrett* of the same, and before the said time when &c., to wit, on &c. last aforesaid, with the consent of the said *John Barrett*, erected and made the said pig-stye in the said yard in which &c.; that he, further relying on the said assurance and promise of the defendant, afterwards, and long before the said time when &c., to wit, on &c., brought the said cattle, goods, and chattels in the said declaration mentioned, being his proper cattle, goods, and chattels, into and upon the rooms and apartments and yard in which &c.; that, before the said time when &c., and before the making the tender hereinafter mentioned, he had paid to the said *John Barrett* all the rent which had become due and payable from him to the said *John Barrett*, for or in respect of the said rooms and apartments and yard in which &c., before the said time when &c., except a small sum of money, to wit, the sum of 2*l.* 15*s.* of lawful money of *Great Britain*; and that always from the time the said sum of 2*l.* 15*s.* of the rent aforesaid, or any part thereof, became and was due and payable from and by the plaintiff to the said *John Barrett*, hitherto, he was and still is ready and willing to have paid and to pay the same to the said *John Barrett*; and that he, before the said time when &c., to wit, on &c., at &c., was ready and willing to have paid, and then and there tendered to pay to the said *John Barrett* the said sum of 2*l.* 15*s.* as aforesaid, to receive which of the plaintiff, the said *John Barrett* wholly refused; and further, that, at the said time when &c., there was not any other or more rent due or payable from him the plaintiff to the said *John Barrett*, than the said sum of 2*l.* 15*s.* so tendered and offered, and so refused as aforesaid; that he was and remained in the quiet and peaceable pos-

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session, use, occupation, and enjoyment of the said rooms and apartments, pig-stye, and yard in which &c., as tenant thereof to the said *John Barrett*, and that the said cattle, goods, and chattels in the said declaration mentioned, being the proper cattle, goods, and chattels of him the plaintiff, were in and upon the said rooms and apartments, pig-stye, and yard in which &c., until the defendant, at the said time when &c., of his own wrong, and in breach of the said assurance and promise, did and committed the trespasses in the declaration mentioned, and in and by his said last plea attempted to be justified, in manner and form as the said plaintiff hath above thereof complained against him.

To this replication the defendant demurred. The plaintiff joined in demurrer.

Mr. Serjeant *E. Lawes*, in support of the demurrer.—This matter, if well pleaded, amounts to no more than a collateral contract, which, if broken, although it might form the ground of a collateral action, clearly cannot operate as a release in law of the defendant's right to distrain; or, even if it were allowed to operate as a release, there is no consideration for it; it is a mere gratuitous promise. At all events, it was only a conditional undertaking, not to trouble or molest the plaintiff so long as he regularly paid his rent to *Barrett*. That condition has not been performed. It is not averred that the rent was regularly paid. On the contrary, the replication states that a small sum remained unpaid, and as to that sum the plaintiff alleges a tender; but it is not averred that the tender was made on the day the rent became due, nor that the defendant had notice of the tender.

Mr. Serjeant *Taddy*, *contra*.—The replication in substance amounts to this, that the defendant gave the plaintiff permission to put his goods on the premises in ques-

tion, without their being subjected to a distress for rent due to him from his immediate tenant, *Barrett*. The only condition attached to this promise was, that it should enure only so long as the plaintiff should pay his rent to *Barrett*. It is in the nature of a license, and falls very much under the principle of *Webb v. Paternoster* (a), where a license to stack hay upon land was held not to be countermandable, provided the license were for a certain time. That case was acted upon in *Taylor v. Waters* (b). The condition upon which the license was given has been sufficiently performed in this case. It is distinctly averred that all rent due from the plaintiff to *Barrett* has been paid except 2*l.* 15*s.*, and, as to that sum, that it was tendered to *Barrett* before the time of the distress, and refused by him. The condition, therefore, has been substantially complied with. It was not necessary that the tender should be made on the very day the rent became due.

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Lord Chief Justice TINDAL.—In the case of *Webb v. Paternoster*, the whole argument turned upon the license. The agreement in this case, however, cannot operate as a license, for, at the time he entered into the contract, the defendant had parted with the possession of the premises to *Barrett*. He had no authority, therefore, to give a license. The matter replied strictly and properly amounts to no more than an undertaking or promise on the part of the defendant, that he would not trouble the plaintiff or his goods so long as he regularly paid his rent to *Barrett*. Without, therefore, entering into the question whether or not there was a sufficient consideration for this promise, it appears to me to be enough to say that the condition upon which its performance was made to depend has not been fulfilled. The words of the replication are, “that the defendant assured and promised the plaintiff, that, as long as

(a) Palmer, 71.

(b) 7 Taunt. 374.

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he the plaintiff paid to the said *John Barrett* the rent which should become due from him to the said *John Barrett* for the said rooms and apartments, &c., he the defendant would never trouble the plaintiff or his property." The intention of that evidently was, so long as the payments were strictly and regularly made, so as to enable *Barrett* to pay his rent to the defendant. And here it appears from the replication that the rent was only paid up to a certain period, and that a portion of it still remains due, *vis.* 2*l.* 15*s.* As to that sum the replication avers a tender to *Barrett*. Although that might be an answer to a distress by *Barrett*, it clearly is not so as to the superior landlord, a third person; at all events, not unless it appeared that he had notice. The landlord had a vested right to make a distress. Inasmuch, therefore, as it is not alleged that the defendant had notice of the tender and refusal, and as the condition upon which the defendant's undertaking was made to depend was not in terms performed by the plaintiff, it seems to me that the replication cannot be supported.

Mr. Justice PARK.—The undertaking of the defendant was conditional, and as the plaintiff has not shewn that he has complied with the condition in its terms, it seems to me that the landlord ought not to be deprived of his right of distress.

Mr. Justice GASELEE.—As the condition of the defendant's undertaking has not been performed, it is unnecessary to say whether the consideration was sufficient or not; it is enough for us to say that the condition has not been strictly complied with, and therefore the defendant's right of distress remains to him.

Mr. Justice BOSANQUET.—I am of the same opinion. The condition upon which the defendant entered into the

undertaking set forth in the replication, has not been duly complied with. The case of *Webb v. Paternoster* does not apply. There, the license was given by the landlord before he had granted a lease of the premises, and whilst he was entitled to the possession, and had authority to give it. Here, however, the supposed license was not given until after he had parted with the possession to another.

Judgment for the defendant.

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ADAMS v. GIBNEY (sued with ELIZABETH MARIA PEYTON),
Executor of J. R. PEYTON.

6 Bing. 656

Wednesday,
June 16th.

THIS was an action of covenant. The declaration stated—That, on the 20th day of *November*, 1821, by indenture between *J. R. Peyton* of the one part, and the plaintiff of the other part—after reciting that the plaintiff had agreed with the said *J. R. Peyton* for a lease of *Wakehurst Park* for the term of fifteen years from *March* then last past, subject to the covenants thereafter contained—it was witnessed, that, for and in consideration of the rents, covenants, and agreements thereafter contained, *J. R. Peyton* had demised certain premises to the plaintiff, containing five hundred acres, &c. (subject to certain exceptions and reservations), *habendum* from the 25th *March*, 1821, for fifteen years, at the rent of 40*l.* *per annum*, clear of all taxes except poor's rates, which poor's rates were to be paid by *J. R. Peyton*, his executors or administrators, or such other person or persons as should for the time being be entitled to the reversion and inheritance of the said premises; and the plaintiff, for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree to and with the said *J. R. Peyton*, and to and with all and every such person and persons as should for the time being be entitled to the rever-

Tenant for life, remainder over, by indenture demised to the lessee, his executors, &c., for the term of fifteen years, without any express covenant for quiet enjoyment. The lessee was evicted by the remainder-man after the death of the tenant for life, but before the expiration of the fifteen years: —*Held*, that the lessee could not maintain an action of covenant against the executor of the tenant for life in respect of such eviction.

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sion and inheritance of the said premises, or any part thereof, in manner and form following, that is to say, that the plaintiff, his executors, administrators, or assigns, should and would, from time to time, and at all times during the continuance of the term thereby demised, well and truly pay or cause to be paid unto the said *J. R. Peyton*, his heirs, executors, or administrators, or to such other person or persons as aforesaid, the said yearly rent of 40*l.* of lawful current money as aforesaid, upon the several days and times and in the manner thereinbefore mentioned; that the plaintiff should not lop, top, stubb up, or destroy any of the trees thereinbefore excepted, or else should pay the sum of 20*l.* *per* load for trees so lopped, topped, stubbed up, cut down, or destroyed, to the said *J. R. Peyton*, or such other person or persons as aforesaid; that a new fence should be made all round the park at the joint expense of both lessor and tenant, and that *J. R. Peyton* should put the messuage on the premises into good and tenantable repair; that the said fence, building, and messuage should be thenceforth kept in repair by the plaintiff; and that *J. R. Peyton* should provide thirty new rabbit-hutches for the use of the plaintiff: And it was covenanted that it should and might be lawful for the plaintiff, his executors, administrators, or assigns, at any time or times during the continuance of the term thereby demised, to cut down the underwood that might be standing and growing on the demised premises, at such age as he or they should think fit, and take and carry away the same for his and their own use and benefit; and also that he, the said *J. R. Peyton*, his heirs, executors, or administrators, or such other person or persons as aforesaid, should and would, at the end, expiration, or other sooner determination of the said demise and lease, pay the plaintiff, his executors, administrators, or assigns, for the underwood then standing and growing on the demised premises, down to the stem, and also for the stock of rabbits that might

then be thereon, as the same should be valued and appraised by two indifferent persons, one to be chosen by each party, and, in case they could not agree, by a third person to be appointed by them for an umpire, whose valuation and appraisement should be final and conclusive, and the amount thereof be paid by the said *J. R. Peyton*, his heirs, executors, or administrators, to the plaintiff, his executors, administrators, or assigns.

It was then averred, that the plaintiff entered into and upon the demised premises on the 20th *November*, 1821; and that he had well and truly observed, performed, fulfilled, and kept all things in the said agreement contained, on his part and behalf to be observed, performed, fulfilled, and kept, &c.

Breach—That, before and at the time of the making of the said indenture, and from thence until and at the time of the death of the said *J. R. Peyton*, he, the said *J. R. Peyton*, was only seised of the demised premises in his demesne as of freehold for the term of his natural life, and was not by law empowered, authorized, or entitled to grant or demise to the plaintiff the demised premises for the said term of fifteen years in manner aforesaid, or for any period beyond the life of him the said *J. R. Peyton*, so as to bind the person entitled to the freehold of the demised premises upon the death of the said *J. R. Peyton*, or to render such term and lease obligatory upon such person; that, whilst the plaintiff was possessed of the said term by the said indenture granted, to wit, on the 1st *April*, 1825, the said *J. R. Peyton* died, to wit, at &c., and thereupon the said term ended and was determined and became void, and one *J. I. W. Peyton* then and there became and was entitled to the freehold and inheritance of the demised premises and the possession thereof, and laid claim to and demanded of the plaintiff the immediate possession of the said premises, in breach of the said indenture; that thereupon, afterwards, to wit, in *Trinity* Term, in the Seventh

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year of the reign of our Lord the now King, a certain action of ejectment was commenced and prosecuted by and on the behalf of the said *J. I. W. Peyton*, wherein *John Doe* was the nominal plaintiff, against the said now plaintiff, *Thomas Adams*, for the recovery of the possession of the premises so demised by the said indenture; that, on the 2nd *December*, 1826, notice was given to the executors of the said *J. R. Peyton*, that the now plaintiff would hold them responsible for all damages, costs, losses, or expenses he might sustain or incur by reason of the said action, in the event of the plaintiff therein succeeding in such action, or the said plaintiff, *Thomas Adams*, being thereby interrupted in the possession or enjoyment of the said tenements, or any part thereof, or evicted therefrom during the remainder of the said term of fifteen years, under or by virtue of the said ejectment, or by reason of any defect of title, or inability of the said *J. R. Peyton* to grant the said lease to the said plaintiff, *Thomas Adams*, as aforesaid; that the defendants refused to settle such action of ejectment; that the plaintiff accordingly defended the said action, being ignorant whether *J. I. W. Peyton* had or not full right and title to the premises; that, in *Easter Term*, 1827, judgment was recovered in the said action of ejectment: whereupon the plaintiff was forced to deliver, and did deliver up the possession of the premises to *J. I. W. Peyton*; that the plaintiff sustained damage thereby for the loss of the enjoyment of the premises, and also did, on the 26th *May*, 1827, pay the damages and costs sustained in the said action of ejectment, amounting to the sum of 189*l.*, as also his own costs of defending the said action; that, in *Hilary Term*, 1828, an action of trespass was brought by *J. I. W. Peyton*, for mesne profits, and on the 22nd *February*, 1828, the plaintiff gave the defendants, as executrix and executor, notice of such action; that, in *Hilary Term*, 1829, the costs and damages recovered in the said last-mentioned action were 477*l.*,

and that the plaintiff's own costs incurred in the said last-mentioned action were 200*l.*; that, on the 18th *February*, 1827, a bill in Chancery was filed by *J. I. W. Peyton*, to restrain the commission of waste, and an injunction obtained; and that the plaintiff was hindered and prevented from cutting the underwood, by reason of the lease being determined.

Further breach—That there was a large quantity of underwood, and stock of rabbits on the premises, which underwood and rabbits the plaintiff resigned on the premises; and that he was always ready to appoint a proper person to value the underwood and rabbits, and on the 2nd *December*, 1826, gave notice to that effect, but that the defendants refused to concur.

The case came before the Court on a demurrer to the replication to certain pleas pleaded by the defendants. The question turned upon the sufficiency of the declaration—whether, under the circumstances stated therein, the plaintiff, the lessee, could maintain covenant against the executors of the lessor.

Mr. Serjeant *Scriven*, in support of the demurrer (a).—There is a wide distinction between a warranty in law and a covenant in law. In this case the words of the lease imply no more than a warranty in law. The lessor was only tenant for life. It is a fundamental principle of law, that a warranty ceases with the estate upon which it depends. It is of a personal nature; and the breach of it must be shewn in the life-time of the tenant for life, or during the existence of the estate of the party who makes it. In *Hargrave* and *Butler's* notes to *Coke Littleton* (b), the learned annotators, after explaining the operation of the

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(a) Mr. Serjeant *Adams* was in the last *Easter* Term.
with him. The case was argued (b) *Co. Litt.* 384 a, [n. 332].

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words "grant" or "give," in conveyances of estates in fee-simple, and shewing the distinction taken with respect to estates tail and leases for life, proceed thus: "But, in leases for years, the case is very different. A lease for years (a) is a contract between the lessor and the lessee for the possession and profits of land on the one side, and a recompense, rent, or other income, on the other. As the lessor contracts that the lessee shall hold the land, he cannot claim it in opposition to his covenant. Thus, he parts with the land during the term; but his supposed parting with the land, and the interest of the lessor in it, during the term parted with, was rather a consequence of law accruing from the contract, than the contract for the enjoyment a consequence of law accruing from the parting with the land. The tenant, therefore, had only the perception of the profits, and was considered to hold the possession for the reversioner. The consequence was, that whoever recovered the freehold reduced the term, whether the recovery were true or feigned. As the possession was not considered to be in the lessee, there was originally no means by which he could recover it. His only remedy was in consequence of the contract which constituted the lease. By virtue of that, the words 'yielding and paying,' &c., were construed a covenant in favour of the lord, which enabled him to recover his rent by an action of covenant or an action of debt, and the words 'grant, demise, &c.,' were construed a covenant in favour of the tenant, which enabled him to recover damages as a recompense for the possession lost. In this sense they are said to imply a warranty." That is a clear authority to shew that the agreement in this case imports merely an implied warranty, and not a covenant in law. In *Bacon's Abridgment* (b), it is said—"Tenant for life can make no

(a) Referring to Bac. Abr. tit.
"Leases and Terms for Years."

(b) Tit. "Leases and Terms for
Years," (I) 2.

leases to continue longer than his own life (a).” Lord *Coke* says (b)—“ A warrantie doth not extend to any lease, though it be for many thousand years, or to estates of tenant by statute staple or merchant, or *elegit*, or any other chattel; but only to freehold or inheritances, as it appeareth in all *Littleton’s* cases which he putteth in this chapter.” That passage shews that the doctrine of warranty is not applicable, beyond its personal character, to leases. In *Shepherd’s Touchstone* (c), it is laid down that—“ If one make a lease for years of land, by the words ‘ demise or grant,’ and there is not contained in the lease any express covenant for the quiet enjoying of the land; in this case, the law doth supply a covenant for the quiet enjoying of it against the lessor and all that come in under him by title *during the term*; and upon this the lessee, his executors, administrators, or assigns, may have an action of covenant if he be disturbed.” Again (d)—“ If a lessee be ousted by one that hath title, it seems an action of covenant will lie for this ouster against the executor or administrator, upon the covenant in law, if he were put out in the life-time of the lessor, but not otherwise; for, if there be tenant for life, the remainder in fee to another, and the tenant for life, by the words ‘ demise or grant,’ doth make a lease for years, and die, and after, he in remainder doth enter and put out the lessee for years; in this case, he cannot upon this covenant in law charge the executors or administrators of the lessor.” In *Bacon’s Abridgment* (e), it is laid down that—“ In every case where the testator is bound by a covenant, the exe-

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(a) His leases are merely void upon his death, and therefore cannot be set up against the remainder-man by his acceptance of rent and suffering the tenant to make improvements after his interest vests in possession. *Doe v. Butcher*,

Doug. 50. But *quare*, whether, in such case, equity would not relieve? *Stiles v. Cooper*, 3 Atk. 692.

(b) Co. Litt. 339 a, [e].

(c) Tit. “Covenant,” p. 165.

(d) Ibid. p. 178.

(e) Tit. “Covenant,” (E).

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cutor shall be bound by it, *if it be not determined by his death* (a). If *A.* be tenant for life, the remainder to *B.* in fee, and *A.* by indenture demise &c. to *C.* for fifteen years, and after *A.* die, and *B.* enter upon *C.*; yet *C.* shall have no action of covenant against the executors of *A.* (b); for, the covenant was but during the term, which was determined by the death of the tenant for life (c). In *Swan v. Stransham and Searles* (d), a tenant for life made a lease for years by "demise and grant," rendering rent, by indenture, and died within the term, and the remainder-man entered on the termor. Three of the Justices, *Welshe, Browne, and Dyer*, thought "that the executors should not be charged by this covenant in law, because the covenant in the law ends and determines with the estate and interest of the lessee; and if it had been a covenant in fact, or expressed, or warranty of the term expressed, it would be otherwise." Mr. Justice *Weston* was of opinion against the other three Justices—"because the lease was by indenture, which is matter of conclusion and estoppel; but, if it were by deed-poll, he agreed with his companions." The same case is adverted to in *Viner's Abridgment* (e), and also in *Fitzherbert's Natura Brevium*, where the principle is laid down thus (f)—"And in a writ of covenant brought by the lessee against the lessor, if the term be not expired he shall recover the term again if he hath put him out: But (g), if tenant in tail makes a lease for years by deed, and dies seised of assets in fee-simple, yet the issue in tail may enter; and therefore the lessee shall have a

(a) S. P. Vin. Abr. tit. "Covenant," (D). pl. 1.

(b) So, if tenant in tail demise, and die without issue. And. 12; 1 Leon. 179; Cro. Eliz. 257: and see Litt. Rep. 334.

(c) So, if the lessor had granted, bargained, and sold all his estate to another, admitting there

was by these words a warranty implied, yet it determines with the estate. Cro. Eliz. 157; 1 Leon. 179.

(d) *Dyer*, 257 a.

(e) Tit. "Covenant," (E). pl. 7.

(f) *Fitz. Nat. Brev.* 145.

(g) *Ibid.* note (c).

writ of covenant against him to recover damages, but not to recover the term, for his entry was lawful." In *Wentworth* (a), it is said—"If lessee for life make a lease for years, and die within the term, so as the lessee is evicted by him in reversion and remainder: in this case it was resolved, that, by this covenant in law, the executors were not chargeable"—citing the case of *Swan v. Stransham and Searles*. All these authorities fully and completely recognize the distinction above adverted to. In *Nokes's* case (b), the defendant demised to the plaintiff a house in *L.* by the words "demise, grant, &c.," and the lessor covenanted that the lessee should enjoy the house during the term, without eviction by the lessor, or any claiming under him; and the lessor was bound to perform all covenants, grants, articles, and agreements, &c., in the indenture: the plaintiff granted his term over to a stranger. In debt upon this bond, the defendant pleaded performance of the covenants. The plaintiff assigned for breach, that one *Savery* entered upon the assignee, and made a lease of seven years to one *Ducke*, if he should so long live, who brought *ejectione firmæ* against the assignee, and recovered by verdict, and had execution: upon which the defendant demurred in law. Lord Coke there says—"I heard the Lord *Dyer*, and the whole Court of *Common Pleas*, resolve (Hill. 14 Eliz.) that, if a man makes a feoffment by deed by this word "*dedi*," and with express warranty in the deed, he may use the one or the other, at his election; and that the statute *De Bigamis*, cap. 6, is to be intended that *dedi* imports a warranty, although the clause of warranty be not contained in the deed. The letter of which statute is—*In chartis ubi continentur 'dedi et concessi,' &c., sine clausulâ warrantiæ, ipse feoffatur in vitâ suâ, &c., sine warrantiâ, &c., id est, quamvis nullam continet clausulam warrantiæ, tenetur warrantizare.* But *nota*, by force of the said

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(a) Went. Off. Ex. 125.

(b) 4 Rep. 81.

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act, now *dedi* is made an express warranty *during the life of the feoffor*." In *Bragg v. Wiseman* (a), *Fitch* and his lady were seised of land in right of his wife for term of her life, and joined together in a lease by deed indented, in which were the words "demise and grant," and afterwards *Fitch* died; the lady entered and avoided the lease, and made a new lease to a stranger; whereupon an *ejectione firmæ* was brought against the first lessee, and judgment given thereupon, and the first lessee put out of possession: whereupon the first lessee brought covenant against the executors of *Fitch*, upon the words "demise and grant." The Court said—"A covenant in law shall not be extended to make one do more than he can, which was, to warrant it as long as he lived, and no longer. The law doth not bind a man to an inconvenience. If tenant for life make a lease for twenty years, and covenant that the defendant shall enjoy it during the term, that shall be during his life; for the term endeth by his death: but otherwise it is if the covenant be during the term of twenty years, by the word demise, an action of covenant lieth, although he never enter; and this word demise implieth as much as "*dedi et concessi*." That case is exactly in point. In *Procter v. Johnson* (b), *Nokes's* case was adverted to in argument by *Yelverton*, who said he considered it all one with that case; and the Lord Chief Justice said—"That which is said in *Nokes's* case, that otherwise the special covenant shall be of no effect, if it cannot qualify the generality of the covenant in law; this seems well to this purpose, that is, that, if the lessor dies, and any under the testator claim the estate, the action of covenant in this case lies against his executors; which remedy otherwise he cannot have, for, if a man makes a lease by these words, "demise and grant," and dies, an action of covenant doth not lie against his executors; as it is said in the

(a) 1 Brownlow, 22,

(b) 2 Brownlow, 212.

9 *Eliz. Dyer*, 257. But otherwise upon *express* covenant, and then this express special covenant shall be to this purpose." That case is a further recognition of the distinction between express and implied warranty. In *Cheiny* and *Langley's* case (a), a tenant for life of certain lands leased the same for years, by indenture, with these words, "I give, grant, bargain, and sell my interest in such lands for twenty years, to have and to hold in such manner and form as I myself did hold the same, and no otherwise." The tenant for life died within the term, and he in the reversion entered, and the lessee brought an action of covenant. *Per Godfrey, J.*—"The action doth not lie, for here is not any warranty, for the plaintiff is not lessee, but assignee, to whom this warranty in law cannot extend; but, admit that the warranty doth extend to the plaintiff, yet it is now determined with the estate of the tenant for life, and so the covenant ended with the estate." In *Blackstone's Commentaries* (b), it is said, that—"If before the statute of *Quia Emptores* a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services, the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift), were originally stipulated to be rendered. But, in a feoffment in fee by the verb *dedi* since the statute of *Quia Emptores*, the feoffor only is bound to the implied warranty, and not his heirs; because it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior lord of the fee. And in other forms of alienation gradually introduced since that statute, no warranty whatsoever is implied, they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty, to bind the grantor and

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(a) 1 Leon. 179; S. C. Cro. Eliz. 157.

(b) 2 Bl. Com. 300.

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his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or warrant." The same principle is established in *Hyde v. The Canons of Windsor* (a). In *Comyns's Digest* it is said (b):—"A warranty is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same lands, and to render in value if they are evicted by a former title. Warranty is express or implied. No word in law makes an express warranty, except the word *warrantizo*. But a feoffment by the word *dedi*, implies a warranty to the feoffee and his heirs during the life of the feoffor. And, before the statute *Quia emptores terrarum* (c), if a feoffment was by *dedi, tenendum* of the feoffor and his heirs, the heirs, as well as the feoffor himself, were bound to warranty in respect of the tenure. But *concessi* does not imply a warranty." In *Andrews's case* (d), it was holden by *Gawdy* and *Fenner*, Justices, "that, if a lease for years be made by deed indented, with these words, *demisi et ad firmam tradidi*, upon that a writ of covenant lieth against the lessor if he himself entereth upon the lessee; but contrary if a stranger enter, if it hath not clause of warranty; for, by *Fenner, J.*, when covenant is brought upon that word *demisi*, the plaintiff shall recover the term itself, but not damages, and that cannot the plaintiff do when a stranger entereth;" and that was holden for clear law. In the present case, therefore, as the lease ended with the life of the grantor, and the implied warranty arising out of the words of demise, attaching only to the lessor himself, and not enuring to bind his representatives, the declaration cannot be supported.

Mr. Serjeant *Bompas* (e), *contra*.—A sufficient ground

(a) Cro. Eliz. 553.

Eliz. 214.

(b) Tit. "Garranty," (A).

(e) Mr. Serjeant *Taddy* was with him.

(c) 18 Ed. 1, c. 1.

(d) 2 Leon. 104; S. C. Cro.

of action does appear upon the face of this declaration. An implied covenant arises on the word "demise," sufficient to entitle the lessee to maintain an action in respect of the eviction in this case: at all events, if that be not so, enough appears on the whole of the covenants set out upon the face of the record, to render the executors of the lessor liable in this action. This is not a warranty, but a contract. In *Hargrave* and *Butler's* notes to the *First Institute* (a), after explaining the operation of the words "give" and "grant," with respect to estates in fee-simple, estates tail, and leases for life, it is said—"Thus it stood in respect of grants in fee-simple, in tail, or for life; and in all these cases the warranty must be understood in its strict legal import, as implying an obligation in the lord to acquit his tenant against the superior lord, where there was a seignory paramount, and to give the tenant a recompense in case of eviction. But, in leases for years, the case is very different. A lease for years is a contract between the lessor and the lessee for the possession and profits of land on the one side, and a recompense, rent, or other income on the other. As the lessor contracts that the lessee shall hold the land, he cannot claim it in opposition to his covenant." In the same place it is said, that, "when lands were granted to be held of the grantor himself, at least if the grant were made by the word '*dedi*,' there, without any other warranty, the feoffor and his heirs were bound to warranty. This is enacted by the statute *De Bigamis* (4 *Edw.* 1, c. 6); and we have Lord *Coke's* authority that this statute was only declaratory of the common law in this respect. The reason for implying warranty, in this case, is by his Lordship said to be, that, 'where *dedi* is accompanied with a perdurable tenure of the feoffor and his heirs, there *dedi* importeth a perdurable warranty for the feoffor and his heirs to the feoffee

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(a) Co. Litt. 384 a, [n. 332].

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and his heirs (a).” This is further confirmed by Lord Coke (b), who says—“ Albeit the words of the statute of *Bigamis* be, *in cartis, autem, ubi continentur, dedi et concessi, &c.*, yet if *dedi* be contained alone, it doth import a warranty; for, the statute doth conclude, *ipse tamen feoffatur in vita sua ratione proprii doni sui tenetur warrantizare*; so as *dedi* is the word that implieth warrantie, and not *concessi*. Also, where the words of the statute be further, *sine clausula quæ continet warrantiam*, the meaning of the statute is, that *dedi* doth import a warrantie in law, albeit there be an express warrantie in the deed. For, if a man make a feoffment by *dedi*, and in the deed doth warrant the land against J. S. and his heirs, yet *dedi* is a general warrantie during the life of the feoffor.” In *Holder v. Taylor* (c), the plaintiff declared for a lease for years made by the defendant by the word *demise*, and shewed, that, at the time the lease was made, the lessor was not seised of the land, but a stranger; but he did not lay any actual entry by force of his lease, nor any ejectment of the stranger, or any claiming under him: whereupon it was objected that no action of covenant would lie, because there was no expulsion. But the whole of the Court was of opinion—“ that an action did lie; for, the breach of covenant was in that the lessor had taken upon him to demise that which he could not; for, the word *demise* imports a power of letting, as *dedi* a power of giving: and it is not reasonable to enforce the lessee to enter upon the land, and so to commit a trespass. But, if it were an express covenant for quiet enjoying, there perhaps it were otherwise (d).”

[Lord Chief Justice *Tindal*.—That was an action against the covenantor himself].

(a) 2 Inst. 275.

(b) Co. Litt. 384 a.

(c) Hobart, 12.

(d) And see the case of *Elias Tisdale v. Sir William Essex*, Hobart, 34, 5.

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In *Burnett v. Lynch*, Mr. Justice *Littledale* says (a)—“An action of covenant will lie, by the lessee against the lessor, upon the word ‘demise’ in the lease; but that word imports a covenant in law, on the part of the lessor, that he has good title, and that the lessee shall quietly enjoy during the term, and therefore, if the lessee be ousted during the term; an action of covenant will lie by him against the lessor.” And in *Iggulden v. May*, Lord *Eldon* says (b)—“There is a covenant for quiet enjoyment under the words ‘granted and demised;’ a covenant for payment of rent under the words ‘yielding and paying;’ and other covenants under other general words in this lease. In a Court of law, generally, the construction ought to be as to both the express and implied covenants; more particularly, where there is but one express covenant: and, upon the ordinary sense, it is supposed to mean express covenants only. It was settled so long ago as the time of *Siderfin*, that, where a bond is given generally for performance of covenants in a lease, it extends to protect breaches of implied, as well as express covenants; and if rent is not paid, or there is an eviction, the bond is forfeited for breach of the two implied covenants I have mentioned.” These authorities shew that the whole lease taken together amounts to an implied covenant on the part of the lessor, co-extensive with the term he undertakes to grant.

[Lord Chief Justice *Tindal*.—From the lease itself the lessee must have known that the lessor was only tenant for life. This is perfectly clear upon the whole of the record].

There can be no reason why the executors should not be liable to implied, as well as to express covenants. The case of *Cheiny v. Langley* is no authority for the position for which it is cited in *Comyns's Digest*. There, tenant

(a) 5 Barn. & Cress. 609; S. C. 8 Dow. & Ryl. 368. (b) 9 Ves. 325.

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for life granted a lease for years of lands, by indenture, with these words—"I give, grant, bargain, and sell all *my interest* in such lands, for twenty years, to have and to hold in such manner and form as I myself did hold the same, and no otherwise." The party was granting only his interest in the land; it is therefore clear that no implied warranty could arise upon that. The same case is referred to in *Viner's Abridgment* (a), where, in the marginal notes, much doubt is thrown upon the doctrine. In *Shepherd's Touchstone*, it is said (b): "A covenant is either express or in deed, *i. e.* when the covenant is expressed in the deed, as, where *A.* by deed doth covenant with *B.* to serve him for one year, and *B.* doth covenant with *A.* to pay him 10*l.* for his service: or it is implied, or in law, *i. e.* when the deed doth not express it, but the law doth make and supply it; as, when one doth make a lease for years by the words 'demise' or 'grant,' without any express covenant for quiet enjoying; in this case, the law doth intend and make such a covenant on the part of the lessor, which is, that the lessee shall quietly hold and enjoy the thing demised against all persons, at least having title under the lessor, and at least during the lessor's life, and (as some think) during the whole term: and hereupon an action of covenant may be brought against him in the reversion; so that, if the heir that is in by descent put out the termor of his father, the termor may have this action against him (c)." The case of *Bragg v. Wiseman* is not law. It is contrary to *Holder v. Taylor*, where the action

(a) Tit. "Covenant," (D).

(b) Page 160.

(c) Where the covenant is created by the law, the covenantee cannot bring an action of covenant if he be not evicted by one who has a title; but it is otherwise in case of an express cove-

nant. 2 Brownlow, 161. The distinction between implied covenants by operation of law, and express covenants, is, that express covenants are taken more strictly. *Per Lord Mansfield*, 3 Burr. 1639. See also *Loyd v. Tomkies*, 1 Term Rep. 671.

was held to lie during the life of the lessor. The pleadings in *Swan v. Stransham* and *Searles*, are set out in *Bendloe* (a), where it appears to have been an action to recover the term.

[Lord Chief Justice *Tindal*.—In *Bendloe*, the count was for damages].

In *Andrews's* case, and *Bragg v. Wiseman*, also, the plaintiffs demanded the term. In the former, Mr. Justice *Fenner* says—"When covenant is brought upon that word 'demisi,' the plaintiff shall recover the term itself, but not damages." *Fitzherbert* says (b), that, "in a writ of covenant brought by the lessee against the lessor, if the term be not expired he shall recover the term again if he hath put him out:" and in the note (c)—"But, if tenant in tail makes a lease for years, by deed, and dies seised of assets in fee-simple, yet the issue in tail may enter; and therefore the lessee shall have a writ of covenant against him to recover damages, but not to recover the term, for his entry was lawful." In *Proctor v. Johnson*, too, the action was brought for the term. Here, however, the plaintiff does not seek to recover the term, but only damages for the eviction.

The recital in the lease, "that the plaintiff *had agreed* with *J. R. Peyton* for a lease of *Wakehurst Park* for the term of fifteen years," must of itself be taken to be a sufficient express covenant to support the action. In *Co-myns's Digest*, is the following (d)—"If it be said that it is agreed *A.* shall pay 10*l.* to *B.* for his goods, this amounts to a covenant by *B.* to deliver his goods; for *agreed* is the word of both." Again—"If a man covenants to stand seised to the use of his son, saving that his wife shall have the loppings of trees; if the son cuts down the trees, covenant lies against him." In *Barfoot v. Freswell* and *Pi-*

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(a) *Bendloe*, 150.

(b) *Fitz. Nat. Brev.* 145.

(c) *Ibid.* note (c).

(d) *Tit. "Covenant,"* (A. 2).

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card(a), in covenant against two on a demise of a coal-mine by two, except the fourth part, whereby it was recited, that, before the sealing of the indenture, *it was agreed*, on consideration, that the plaintiff should have the third part of the coal digged. On demurrer to the declaration, *Wild* excepted that there was no covenant to pay the third part, but a recital of agreement to have it. But, by *Hales*, Chief Justice—"Were it but a recital, that, before the indenture, they were agreed, it is a covenant: and so, to say, whereas it was agreed to pay 20*l.*; for now the indenture itself confirms the agreement and intent precedent, though it be relative to the former act *in pays*; when it is declared by deed, it is now a covenant by the indenture." In *Severn* and *Clerke's* case (*b*), "*A.* by his deed-poll recited, *that whereas he was* possessed of certain lands for years of a certain term. By good and lawful conveyance, he assigned the same to *J. S.*, with divers covenants, articles, and agreements in the said deed contained, which are or ought to be performed on his part. It was moved, if this recital '*whereas he was,*' be an article or agreement within the meaning of the condition of the said obligation, which was, to perform, &c. And it was clearly resolved, that, if the party had not that interest by a good and lawful conveyance, the obligation was forfeited."

Mr. Serjeant *Scriven*, in reply.—The recital of a deed cannot be set up contrary to the express covenants after-contained. The implied warranty can only be dealt with as applicable to the rule before adverted to—that the warranty ceases with the estate of the warrantor. The cases cited on the part of the plaintiff, are all actions against the lessor himself. What mutuality would there be in this case, if the implied warranty were to be set up against the executors? The covenant is with the lessor only. The

(*a*) 3 Keble, 465.

(*b*) 1 Leonard, 122.

executors, therefore, could not maintain an action against the lessee for any breach on his part. *Sheppard* says (a) —“ The covenant in law upon the words ‘ demise ’ or ‘ grant,’ also for the quiet enjoying of the thing demised, is general against all persons that have title during the term, and extendeth to the heir after the death of the lessor, as against himself only, and shall charge the executors or administrators for any disturbance in the life of the covenantor, but not for any disturbance afterwards; he that doth sue therefore upon this covenant, must shew that he was molested or evicted by one that had an elder title.” *Stile v. Hearing* (b) only decided that covenant lies against the grantor himself. And in *Nokes’s* case, Mr. Justice *Popham*, and the whole Court, said, “ that the express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties, that it should not extend further than the express covenant.”

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Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The question in this case arises upon a demurrer to the replication to one of the pleas of the defendant, which plea is pleaded to the breach of covenant firstly assigned in the declaration, that is, to a breach of covenant for quiet enjoyment; and, as the defendant insists that it appears on the record that no action is maintainable against him as such executor on such supposed breach, it becomes unnecessary to consider any of the pleadings subsequent to the declaration. The question, therefore, becomes this—tenant for life, remainder over, by indenture demises to the lessee, his executors, &c., for the term of fifteen years, without any express covenant for quiet enjoyment; the les-

(a) Touchstone, 167.

(b) Cro. Jac. 73.

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see is evicted by the remainder-man after the death of the tenant for life, but before the expiration of the fifteen years—whether the lessee can maintain an action of covenant against the executor of the tenant for life in respect of such eviction.

That the word “demise” in a lease for years imports and makes a covenant in law for quiet enjoyment by the lessee, at least during the continuance of the estate out of which the lease is granted, is clear from all the authorities, and is admitted by the defendant; but it is contended on his part, that such implied covenant ceases with his estate, as well upon the ground that it is rather in the nature of an implied warranty than of an implied covenant, as upon the direct authority of decided cases.

If it had been necessary to determine this case upon the ground of distinction above referred to, considerable doubt would be thrown upon such distinction in the case of a chattel real, by the authority of Lord Coke (a), by whom it is laid down, “that a warranty cannot be annexed to chattels real or personal; but, if a man warrant them, the party shall have covenant.” We think, however, it is sufficient to say that the cases which have been decided on the precise point now raised are too strong to get over. Such is the case in *Dyer* (b), determined in *Michaelmas Term, 8 & 9 Elizabeth*. The lease in that case, as in the present, was by indenture made by tenant for life, by the word “demise.” The *ouster* in that case, as in this, was by the remainder-man after the death of the tenant for life, and before the effluxion of the term. The action in that case also, as in this, was an action against the executors of the lessor, to recover damages for the breach of covenant (c). And after two arguments it was held in that case by three of the Justices—“that the ex-

(a) Co. Litt. 101. b., 384. a.;
Hargrave and Butler's notes, 332.

(c) See the form of the declaration, Bendloe, 150.

(b) Page 257 a.

ecutors should not be charged with this covenant in law, because the covenant in law ends and determines with the estate and interest of the lessor;" also—"that no cause of action is given against the testator in his life-time." And although one of the Justices differed from the rest, yet he admitted, that, if the lease had been by deed-poll instead of by indenture, he should have agreed with his companions: a distinction which is not assented to by the learned reporter.

The same principle is laid down in *Hyde v. The Canons of Windsor*, and in the case of *Bragg v. Wiseman*, where covenant was brought against the executor of the husband upon a lease by husband and wife, and it is laid down—"that a covenant in law shall not be extended to make one do more than he can, which was, to warrant it as long as he lived, and no longer."

Unless, therefore, some very strong and insuperable objection had been raised to the principle of those decisions (which has not been done in the present case), the doctrine of which appears to have been adopted in books of high authority (a), we think it safer to adhere to them. And no injustice can by this decision be occasioned to the lessee, who must have known, from the form of the reservation in the lease, that his lessor was no more than a tenant for life, but was contented to accept a lease without an express covenant for quiet enjoyment.

It remains only to notice one argument urged by the plaintiff, *viz.*, that, although the action may not be maintainable upon the covenant to be implied from the word *demise*, yet that there is a recital of an agreement for a lease for fifteen years, and that such agreement would of itself be a sufficient express covenant to support the action. But the recital is not of an agreement for a lease of

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(a) See Sheppard's Touchstone. 160; Com. Dig. tit. "Covenant," (C).

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fifteen years absolutely, but for a lease for fifteen years "subject to the covenants thereafter contained." So that the demise by the indenture is the completion and performance of that agreement, and the question still turns upon the lease itself, whether the lease contains such ground of action as is contended for.

Upon the whole, therefore, we think there must be judgment for the defendant as to so much of the declaration as is covered by the plea demurred to.

Judgment for the defendant accordingly.

Thursday,
June 17th.

WORMWELL v. HAILSTONE.

Where the trustees under a road-act are sued in the name of their clerk, in pursuance of the statute 3 Geo. 4, c. 126, s. 74, the property of the clerk is not liable to be taken in execution to satisfy the judgment.

THIS was an action of *assumpsit*, brought against the defendant, as clerk to the trustees acting under and by virtue of the statute made and passed in the sixth year of the reign of King *George* the Fourth, for repairing, widening, improving, and maintaining in repair the turnpike-roads from *Leeds* to *Halifax*, and the several branches and roads therein mentioned, in the West Riding of the county of *York*, that is to say, the trustees appointed for the *Thornton* district of road in the said act mentioned.

The first count of the declaration stated, that *the trustees* were indebted to the plaintiff in the sum of 800*l.* for work and labour and materials found, and, being so indebted, promised to pay.

The defendant pleaded the general issue, thus—And the said *Samuel Hailstone*, &c., comes and defends, &c., and says *that the said trustees did not undertake*, &c.

A verdict having been found for the plaintiff, for 448*l.*, the *postea* was entered up in the terms of the plea, as follows:—

“ Afterwards, that is to say, on the day and at the place within contained, before the Honorable Sir *James Allan Park*, knight, one of his Majesty's Justices assigned to hold pleas in the Court of our lord the King of the Bench, and the Honorable Sir *James Parke*, knight, one of his Majesty's Justices assigned to hold pleas in the Court of our lord the King, before the King himself, and Justices of our said lord the King assigned to hold the Assizes in and for the county of *York*, according to the form of the statute in such case made and provided, come as well the within-named plaintiff as the within-named defendant, by their respective attorneys within mentioned; and the jurors of the Jury whereof mention within is made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried, and sworn, say upon their oath, that *the trustees within mentioned did undertake and promise in manner and form as the said plaintiff hath within complained against the said defendant*, and they assess the damages of the said plaintiff on occasion thereof, over and above his costs and charges by him about his suit in this behalf expended, to 448*l.* 9*s.*, and for those costs and charges, to forty shillings. Therefore, &c., &c.”

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A writ of *fiery facias* afterwards issued upon the judgment signed hereon against the defendant, and the Sheriff thereupon issued his warrant to his bailiffs, commanding “ that they, some or one of them, should omit not by reason of any liberty within his county, but that they should enter the same, and cause to be levied of the goods and chattels in his bailiwick of *Samuel Hailstone*, clerk to the trustees acting under and by virtue of the statute made and passed in the sixth year of the reign of our Lord the now King, for repairing, widening, improving, and maintaining in repair the turnpike-roads from *Leeds* to *Halifax*, and the several branches and roads therein mention-

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ed, in the West Riding of the county of *York*, that is to say, the trustees appointed for the *Thornton* district of road in the said act mentioned, the sum of 525*l.* 14*s.*, which in his said Majesty's Court, before his said Majesty's Justices at *Westminster*, were awarded to *James Wormwell* for his damages which he had sustained, as well by reason of not performing certain promises and undertakings made by the said trustees to the said *James*, as for his costs and charges by him about his suit in that behalf expended; whereof the said *Samuel* was convicted, as appeared to his Majesty of record, &c."

The goods of the defendant having been taken in execution under this writ and warrant—

Mr. Serjeant *Jones*, in the last term, obtained a rule *nisi* to set aside the execution, on the ground that the defendant, as clerk, was not personally chargeable; but that the execution ought to be levied upon the property of the trustees (a).

(a) The following are the enactments particularly bearing upon the question:—

Section 74th of the General Turnpike-Act, 3 *Geo.* 4, c. 126, enacts—"That the trustees and commissioners of every turnpike-road *may* sue and be sued in the name or names of any one of such trustees or commissioners, or of their clerk or clerks for the time being; and that no action or suit to be brought or commenced by or against any trustees or commissioners of any turnpike-road by virtue of this or any act or acts of Parliament, in the name or names of any one of such trustees or commissioners, or their clerk or clerks, shall abate and be dis-

continued by the death or removal of such trustee, commissioner, clerk or clerks, or any of them, without the consent of the said trustees or commissioners; but that any one or more of such trustees or commissioners shall always be deemed to be the plaintiff or plaintiffs, defendant or defendants (as the case may be), in every such action or suit: Provided always, that every such trustee, commissioner, clerk or clerks, shall be reimbursed and paid, out of the monies belonging to the turnpike-roads for which he or they shall act, all such costs, charges, and expenses as he or they shall be put unto or become chargeable with, or be liable to,

Mr. Serjeant *Wilde*, on a former day in this term, shewed cause.—If this execution be set aside, the judgment

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by reason of his or their being so made plaintiff or plaintiffs, defendant or defendants.”

The 4 Geo. 4, c. 95, s. 61, enacts—“That the trustees or commissioners for making or maintaining any turnpike-road, shall not be personally subject to, or liable to be charged with the payment of any sum or sums of money by reason of their having signed or executed any mortgage, or assignment by way of mortgage, or other security to be made by virtue or in pursuance of any act for making and maintaining any turnpike-road: Provided always, that, in case any action, suit, or prosecution shall be brought or commenced against any trustee or commissioner for any thing done by virtue or in pursuance of the said recited act of the third year of his present Majesty (*supra*), or this act, or any such act for making or maintaining any turnpike-road, all the costs, charges, and expenses of defending such action, suit, or prosecution, or which such trustee or commissioner shall incur in consequence thereof, shall be defrayed out of the toll arising on the turnpike-road for which such trustee or commissioner shall act.”

The 7 & 8 Geo. 4, c. 24, s. 2, enacts—“That every trustee who shall order or direct the expenditure of any money for or towards the making, repairing, or altering any road not comprehended within

the act in the execution of which he may be acting, or for or towards the performance of any act, matter, or thing not authorized by such act or the said recited acts, shall be personally liable to the trust for the repayment of the money so expended, at the suit of any person, or any one trustee, or of the clerk to such trustee on behalf of such trust; and that all the costs and charges of such suit, over and above any costs and charges recovered from the defendant in such suit, shall be paid and borne by such trust.”

And the 3rd section enacts—“That no trustee shall be personally subject or liable to be charged (except as hereinbefore next mentioned) with the payment of any sum or sums of money laid out or expended in or towards the making, repairing, or altering any turnpike-road; nor shall execution issue out against the goods and chattels of any trustee, by reason of his having acted as such trustee, or having signed or authorized or directed any contract or security to be entered into relating to any such road, unless in such contract or security such trustee shall have, in express words, rendered himself so personally liable.”

The local act, 6 Geo. 4, c. cxlix. under which the defendant in this case acted as clerk, is intituled—“An act for repairing, widening, improving, and maintaining in re-

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will be wholly fruitless. The error, if any there be upon the record, might be taken advantage of in a more formal and less summary way, *vis.* by writ of error. The only remedy provided by the act is contained in s. 74 of the 3 Geo. 4, c. 126; and that section provides for the reimbursement to the clerk, &c., of all such costs, charges, and expenses as he or they shall be put unto or become *chargeable with* or liable to by reason of his being made plaintiff or defendant. That clause evidently contemplates compulsory payments on the part of the clerk. By the 3rd section of the 7 & 8 Geo. 4, c. 24, the trustees are declared not to be personally liable by reason of their having acted as such trustees. The last-mentioned statute, however, does not extend to protect the clerk. By the Riot Act and other acts, which give a remedy against the hundred, and a power of selecting any inhabitant against whom to proceed, it is provided that execution shall not issue against the individual sued, but a particular mode is pointed out by which to obtain the fruits of the judgment. Where a party who is directed to be made a defendant is not specially protected, he is clearly liable to all the consequences that flow from his character of defendant. Here, the entire absence of remedy against the trustees, or their funds, by *mandamus* or otherwise, shews clearly that the Legislature intended the liability of the clerk to be of a personal nature. At all events, the execution in this case will not prevent the defendant from bringing a writ of error, and obtaining a writ of restitution, if the execution should be found to be erroneous. No injustice will be done to the clerk by holding him li-

pair the turnpike-roads from *Leeds* to *Halifax*, and the several branches and roads therein mentioned in the West Riding of the county of *York*," and confers upon the trustees therein mentioned

the usual powers for making, &c., the branches and roads therein described, and amongst others the *Thornton* district of road; and enables creditors to have access to the books of the trustees.

able; for, he has means of knowing the state of the trust funds, which the plaintiff has not.

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Mr. Serjeant *Jones*, in support of his rule.—The general question in this case is, whether the clerk to the trustees is personally liable for damages recovered against the trustees. The act (3 *Geo.* 4, c. 126, s. 74) directs that the *trustees* or commissioners shall sue and *be sued in the name of their clerk*; not that the clerk himself shall not be sued. The declaration in this case alleges a contract *by the trustees*. The defendant pleads that *the trustees did not undertake* or promise, &c. The issue is in the terms of the plea; and the finding of the Jury is only affirmative of the liability of the trustees. It is thus clear upon the face of the record, that the contract upon which it is sought to charge the defendant is not his own contract. At common law, this defendant clearly would not be liable to an execution under these circumstances. It is therefore incumbent upon the plaintiff to shew some legislative provision to create the liability with which he seeks to charge him. The 74th section of the 3 *Geo.* 4, c. 126, contains nothing to impose such liability upon the clerk; and even if it did so, the subsequent act, 7 & 8 *Geo.* 4, c. 24, s. 3, clearly exempts him from it. The clause providing for the clerk's being made plaintiff or defendant, was introduced in order to prevent the difficulty that would arise from having a numerous body of defendants—to avoid mis-joinder or non-joinder of parties. The 3 *Geo.* 4, c. 126, s. 74, also provides that no action shall abate or be discontinued by reason of the death of the clerk, &c. Now, suppose the clerk to die after judgment against the trustees, and before execution, upon whom is the levy to be made—upon the personal representative of the deceased clerk, or upon his successor, both of whom are equally ignorant of any of the proceedings, and neither of whom would have the means of reimbursing himself? The proviso in the 74th

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section—"that every such trustee, commissioner, clerk or clerks, shall be reimbursed and paid, out of the monies belonging to the turnpike-roads for which he or they shall act, all such *costs, charges, and expenses* as he or they shall be put unto, or become chargeable with, or be liable to, by reason of his or their being so made plaintiff or plaintiffs, defendant or defendants"—does not include "*debts or damages*." It means nothing more than that they shall be reimbursed all such *costs* as they shall be put to by reason of their being made parties to the record. Has the defendant in this case a remedy under this clause to procure his reimbursement if he pays the damages and costs in this action? Certainly not. By the 71st section of the last-mentioned statute, he is prevented from having any control over the trust funds. He has therefore no means of recouping himself.

[Lord Chief Justice *Tindal*.—It is difficult to say that the trustees are sued upon this record.]

Substantially, they are so; though in the name of their clerk.

[Mr. Justice *Bosanquet*.—In what form could the execution issue?]

The property of the trustees would be liable under this writ. A *mandamus* would lie against the trustees to compel a proper application of the funds. If the property of this defendant be liable under a *fieri facias*, his person would also be liable under a *capias ad satisfaciendum*, which clearly could not have been contemplated.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This is an application to the Court to set aside the writ of *fieri facias* which has been issued upon the judgment obtained against the defendant, on the ground that

the statute 3 *Geo.* 4, c. 126, s. 74, which enables the plaintiff to sue the defendant as clerk to the trustees of the turnpike-road, does not authorize any execution against either the person or the property of the defendant.

The clause in question appears to have been introduced, from the difficulty, or indeed impracticability, of carrying to a successful result any action either by or against the whole of the very numerous and fluctuating body of which the trustees of a turnpike-road generally consist. The clause therefore empowers, but does not compel, the trustees to sue or be sued in the name or names of any one of such trustees, or of their clerk or clerks for the time being: leaving it open to any creditor, if he shall think proper, to sue, by the ordinary course of proceeding, any number of the trustees personally, where the nature of the transaction, or the form of the security or contract, gives any ground of action against those particular and individual trustees. In the latter case, the action would have been attended with the ordinary consequences of personal liability on the part of the defendant, had not a later statute, the 7 & 8 *Geo.* 4, c. 24, s. 3, taken away the personal liability of the trustees in every case, unless where the trustees have in the contract or security in express words rendered themselves personally liable.

A provision of this nature, releasing the trustees from liability where the action is brought against them, although they may be the very parties to the contract or security on which the action is brought, affords a strong presumption that it could not be intended that the clerk to the trustees should be personally liable, when the creditor sues the trustees in the name of their clerk. It would be very singular that the creditor of the trustees should have an election to satisfy his demands either out of the trust funds or the personal means of the clerk of the trustees, according to the form of action he thought proper to bring.

But we think, that, under the proper construction of the

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74th section, the clerk is not personally liable to the consequences of an action. The power to sue the trustees in the name of their clerk, is, in other words, the power to make him the *nominal* defendant. The enactment that the suit shall not abate by the death or removal of the clerk, but that the clerk for the time being shall always be deemed to be the defendant, points again to the same distinction between a real and a nominal defendant; and, indeed, it would open the door to inextricable confusion and difficulty, if the clerk for the time being were personally to be looked to for satisfaction of the judgment. Suppose the clerk in whose name the action was defended were to die or be removed after judgment and before satisfaction; it would seem very unreasonable that his successor, who was no party to the defence, should be liable to pay the whole; or, on the other hand, that the executors of the former clerk, who have no concern whatever with the trust funds, should be liable to the demand out of the testator's assets.

But the main ground upon which we collect the intention of the Legislature is this: the only provision for recoupment of the clerk is a reimbursement of all the *costs*, *charges*, and *expenses* which he has been put to by reason of being made defendant. The ordinary meaning of these words will not comprehend the debt or damages recovered; and this must give at the same time the measure of the clerk's personal liability, for it cannot be supposed that he is liable to either the debt or damages recovered where there is no express provision for repaying himself.

It is asked, how are the debt or damages to be recovered in this action, if the clerk is not liable? This act, undoubtedly, makes no direct provision, as do many others of a similar nature (*a*), upon this subject; but there can be

(*a*) See the *West India Dock* the *London Dock Act*, 39 & Act, 39 Geo. 3, c. 69, s. 184—and Geo. 3, c. 47, s. 150.

no doubt that the funds of the trustees may be made answerable for the amount ascertained in the action, in case of a refusal to apply them, either by a *mandamus* or a bill in equity.

It is sufficient, however, for the present application, to decide that we think the act does not authorize a personal execution against the clerk; and therefore we make a rule, not for setting aside this writ of execution, but for restraining the Sheriff from executing it against the personal effects of the clerk.

Rule absolute accordingly.

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HOOPER, Plaintiff; GREEN, Deforciant.

Thursday,
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THE business of passing this fine was entrusted by the attorney to his clerk (who had since left his employ), who proceeded therein as far as passing it through the *King's Silver* office, but the papers were mislaid before the fine reached the *Chirographer's* office. Upon afterwards discovering that the fine had not been duly perfected, copies of the *præcipe* and concord were obtained from the officer, upon which, on an affidavit of the above facts, and that the parties to the fine were all alive and consenting—

The Court refused to allow a fine to be perfected, where, through the negligence of the clerk of the attorney to whom it had been entrusted, the papers had been mislaid before the fine had reached the *Chirographer's* office.

Mr. Serjeant *Merewether* moved that the fine might now pass.—In the case of *Wright*, Plaintiff; *Wright*, Deforciant (a), the concord of a fine being lost before it had passed the *Custos brevium* office, the Court permitted a new concord and acknowledgment to be prepared, and the fine to be perfected. In that case, Mr. Justice *Heath* at first said he had never known it done; “that it

(a) 4 Taunt. 195.

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would be a new fine to all intents and purposes; and that, if the parties were so negligent, and would lose the documents, they must take the consequences." Upon conferring, however, with Sir *James Mansfield*, the Court agreed that they could not discover any mischief that would result from it, and, without referring to the officers (who considered it to be contrary to all practice), permitted it to be done. And in *Moule v. Eyles* (a), the clerk of an attorney employed to levy a fine having absconded, and the papers been mislaid, the Court permitted the fine to be afterwards perfected, although the time allowed by the rule of Court of *Trinity Term 52 Geo. 3* (b), had been exceeded.

[Mr. Justice *Gaselee* referred to *Stone v. Stone* (c), where it was held, that, if an attorney employed to levy a fine, mislays the papers, and does not complete it within the time required by the rule of Court of *Trinity Term 52 Geo. 3*, the Court will not permit the fine to be afterwards perfected, but will, if all the parties be alive, direct a new fine to be levied at the expense of the attorney; and to the case of *Lindo v. ———* (d), where it was held, that, if a fine has been delayed by the attorney's neglect beyond the time prescribed by the rule of Court, it will not afterwards be allowed to pass: and also to a note to the last-mentioned case, where it is stated, that, in a like case, the Court had compelled the agent through whose delay the fine was defeated, to defray the expense of an entire new fine for his client, and declared their determination to pursue that practice].

Lord Chief Justice TRINDAL.—I look upon the neglect of

(a) 1 J. B. Moore, 125.

(b) By which it was ordered, that, from thenceforth, all fines should be left at the office of the *Chirographer* within *fourteen days*

after the same should have passed the *King's Silver* office.

(c) 4 Taunt. 601.

(d) 5 Taunt. 305.

the clerk as the neglect of the attorney. As between the attorney and client there is no difference. A new fine must be levied.

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The rest of the Court concurring—

The Learned Serjeant took nothing by his motion (a).

(a) In 1807, a fine was duly proceeded with as far as the *allocatur*, and the clerk of the attorney for the conusors, having received money to compound the fine at the Alienation-office, absconded with it, and neither the attorney nor any of the parties to the fine knew that the money had not been paid, till 1809. The Court (in *Michaelmas* Term, 1829) permitted the fine to pass as of

Trinity Term, 1807, when it ought to have been perfected, on payment of the King's Silver as compounded for, on affidavits stating that all the parties interested consented to the fine being passed as of that term, although both the conusors were dead. *Ash* and Wife and Another, conusors; *Gee*, conusee, 3 Moore & Payne, 602; S.C. 6 Bing. 275.

HAMILTON v. JONES, PITT, and Another.

Thursday,
June 17th.

THE defendant *Pitt*, who had been arrested in this cause, at the suit of the plaintiff, an attorney of this Court, upon a *capias ad satisfaciendum*, on a former day, moved to be discharged out of custody, on the ground that the name and place of abode of the attorney issuing the writ was not indorsed thereon, pursuant to the statute 7 & 8 Geo. 4, c. 71, s: 8 (a).

An attorney suing out process in a cause in which he himself is plaintiff, need not indorse thereon his name and place of abode.

(a) By which it is enacted—
“That no Sheriff, &c., shall grant any warrant for the arrest of, or shall arrest the person of any defendant upon any writ or process issued by any plaintiff in his own

person, unless the same writ shall, at or before the time of granting such warrant, or of making such arrest, be delivered to such Sheriff, &c., by some attorney of one of the Courts of record at West-

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Lord Chief Justice TINDAL.—The defendant *Pitt* has been arrested upon a *capias* sued out by the plaintiff in person. Upon the face of the affidavit upon which the writ was issued, as also by the declaration, it appears that the plaintiff is an attorney of this Court. The present motion has been made on the alleged ground that the requisitions of the statute 7 & 8 Geo. 4, c. 71, s. 8, have not been complied with on the part of the plaintiff, inasmuch as the writ bears no indorsement of the name and place of abode of the attorney at whose instance it was issued. The object of that enactment was, to remedy the oppression practised by parties improperly issuing writs in their own names, and thus affording to the defendants no possibility of obtaining relief, they not being tangible by the Court. The preamble states, that arrests of the person had in many instances been made under writs sued out by persons not being attorneys or solicitors, and whose places of residence have been unknown, and the practice had been found to be productive of oppression and vexation. The clause then proceeds to enact that no Sheriff, &c., shall grant any warrant for the arrest of, or shall arrest the person of any defendant upon any writ or process issued by any plaintiff in his own person, unless the same writ shall be delivered to him by some attorney, or his clerk or agent; and unless the writ shall be indorsed by such attorney or clerk or agent, in the presence of such Sheriff, &c., with the name and place of abode of such attorney. The very object of that enactment is, that there shall be some party responsible to the Court for the due use of its pro-

minster, or of the Courts of *Great Session* in *Wales*, or of the Courts of the counties palatine of *Lancaster* or *Durham*, or of the Court out of which the said writ shall have issued, or by the clerk of such attorney, or an agent author-

ized by such attorney in writing; and unless the said writ shall be indorsed by such attorney or his clerk, or such agent as aforesaid, in the presence of such Sheriff, &c., with the name and place of abode of such attorney."

cess. Upon the 8th section alone I should feel perfectly satisfied that the present case does not fall within the mischief intended to be remedied by the act. The 9th section, however, puts the matter beyond doubt; for, it provides that "nothing therein contained shall extend to any writ or process sued out by any attorney, solicitor, clerk in Court, or other officer of any Court, having authority to sue out process in his own name." An attorney, therefore, who sues out process on his own behalf, is expressly excepted out of the operation of the 8th section.

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The rest of the Court concurring—

Rule refused.

SHEEN v. GARRETT.

Saturday,
June 19th.

THIS was an action of debt upon a judgment. The defendant's first plea stated—"That, before the suing out of the original writ of the plaintiff against the defendant in this behalf, to wit, on &c., at &c., the defendant became bankrupt within the true intent and meaning of the statute then and still in force concerning bankrupts; that the judgment in the said declaration mentioned, was obtained against the defendant for certain debts and demands in respect of which the plaintiff was entitled to prove, by virtue of the said statute, as a creditor under a certain commission of bankruptcy afterwards duly issued against the defendant; that the aforesaid several debts and demands accrued and were due from the defendant to the plaintiff, before and at the time when the defendant became bankrupt as aforesaid, to wit, at &c. And this he the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him, &c.'

A general plea of bankruptcy under the 6 Geo. 4, c. 16, s. 126, must pursue the words of the statute, and conclude to the country.

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To this plea the plaintiff demurred, assigning for causes—"That the defendant in his said plea has not averred, nor does it thereby appear, that he has ever obtained his certificate of conformity under the said commission in the said plea mentioned, according to the said statute therein mentioned, nor that the defendant has in fact conformed himself to the said statute, whereby the said plea is insufficient according to the general rules of pleading: also for that the defendant has improperly concluded his plea with a verification, and has therein otherwise departed from the form of plea allowed by the said statute, whereby the same plea is insufficient if pleaded by virtue of that statute; also for that the said plea is uncertain, informal, and insufficient &c."

The defendant joined in demurrer.

The case now came on for argument.

Mr. Serjeant *Ludlow*, in support of the demurrer.—The plea is insufficient and informal. It is not a special plea of bankruptcy, for it does not state the trading, petitioning-creditor's debt, adjudication of bankruptcy, the bankrupt's conformity, nor his certificate, as required in a special plea: neither is it a general plea under the statute (a), inasmuch as it does not pursue the directions therein, and concludes with a verification, instead of to the country. In *Miles v. Williams* (b) a plea under the statute 4 *Anne*, c. 17, was held bad for concluding with a

(a) 6 *Geo.* 4, c. 16, s. 126, by which it is provided—"That any bankrupt who shall, after his certificate shall have been allowed, be arrested or have any action brought against him for any debt, claim, or demand thereby made proveable under the commission,

shall be discharged upon common bail, and *may plead in general*, that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence."

(b) 1 *P. Wms.* 249; *S. C.* 10 *Mod.* 160, 247.

verification. Lord Chief Justice *Parker*, in delivering the judgment of the Court, there said: "A liberty of pleading *generally* is given to the bankrupt, and so he may avoid the hazard of pleading *especially*; but then he must take upon him the proof of his conformity to the statute in every particular; or, if he thinks fit to plead the matter *especially*, then he must set forth every point; and by it he has this advantage against the plaintiff, that he must reply one particular only, upon which issue must be taken. Here, the defendant has pleaded the matter *especially*, but not set forth the whole, and therefore it is ill for that reason; for, by the express words of the act, this is to be pleaded so as that the whole merits may be tried. There are several cases at common law, where a man shall conclude his plea to the country, though there be no affirmative and negative, to prevent the inconvenience that would arise by going on to a replication. This statute has formed a new general issue in this case; and this was the foundation of the judgment in *Bird and Lacy's* case, *Mich. 6 Annæ*, that a plea upon this act was well concluded to the country; and, if so, it cannot conclude to the Court."

In *Gery v. Baily* (a), a decision upon the statute 5 Geo. 1, it was held that a plea of bankruptcy to an action brought against the bankrupt, which accrued before his bankruptcy, ought to conclude to the country; "because the act says, that, if the bankrupt be sued, he may plead in general that the cause of action accrued before he was a bankrupt, and give the special matter in evidence." In *Poole v. Broadfield* (b) also, a general plea of bankruptcy was held to be bad for concluding with an averment, instead of to the country. In *Tower v. Cameron* (c), a si-

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(a) Fortescue, 334; Com. Dig. "Pleader." (E) 32.

(b) Barnes, 330.

(c) 6 East, 413; S. C. 2 Smith, 439.

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militer is said to be the proper replication to a general plea of bankruptcy, which it would not be unless the plea concluded to the country. And in *Wilson v. Kemp* (a), after a general plea of bankruptcy concluding to the country, a replication that the defendant was before the commission discharged as a bankrupt, and that his estate had not produced fifteen shillings in the pound, which was pleaded in maintenance of the action generally, and with a verification, was held ill on special demurrer. The plea being given by the statute, the defendant cannot be permitted to make it partly a plea according to the statute, and partly a plea at common law: but must strictly pursue the form pointed out.

Mr. Serjeant *E. Lawes, contra.*—The statute 6 *Geo.* 4, c. 16, s. 126, differs in this respect from other enactments of a like nature that have preceded it. It gives no particular form of pleading. It merely requires one fact to be averred, and that fact does appear upon this plea. The clause upon which the case of *Miles v. Williams* was determined, required that the bankrupt *should* plead generally, whereas the 126th section of the existing act only provides that he *may* so plead. *Hedges v. Sandon* (a) is an authority to shew, that, where a plea alleges new facts, it may either conclude with a verification or to the country.

[Mr. Justice *Gaselee.*—This plea states, that “the aforesaid several *debts and demands* accrued and were due from the defendant to the plaintiff, before and at the time when the defendant became bankrupt as aforesaid.” The words of the act are, that the defendant “may plead in general that *the cause of action* accrued before he became bankrupt.”]

It is not necessary to follow the precise words of the

(a) 2 Mau. & Selw. 549.

(b) 2 Term Rep.

statute; neither is the plea hurt by surplusage. It states in substance that the cause of action accrued before the defendant became bankrupt. The demurrer is one of form only, the whole ground of it being that the plea does not conclude to the country. The act contains no directions as to the form of the conclusion. Besides, the action is not of a nature to be favoured by the Court, neither is the objection.

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Mr. Justice PARK (a).—We have been a good deal pressed with remarks that neither this action nor the objection raised to the plea, are of a nature to merit favour from the Court. I must observe that these are not arguments to be used in this place. The only question is, whether this plea is sufficient. I am of opinion that it is not. The statute has given the defendant the power to plead generally that the cause of action accrued before his bankruptcy. It is contended on the part of the defendant, that it is not absolutely necessary that the precise words of the act should be used; and it is said that the plea in this case has substantially used them. It seems to me, however, that it adopts neither the words nor the sense of the clause. I cannot agree that “the cause of action,” and “the aforesaid debts and demands,” convey the same meaning. When a statute gives a special exemption, a party intending to avail himself of it, must use the precise words of the statute giving it. It is admitted, that, to constitute the plea in question a special plea, a great deal more must have been alleged in it. Therefore, if intended as a special plea of bankruptcy and certificate, it is clearly bad. It has further been urged, that the statute does not require the plea to conclude to the country. But the rule of pleading, established in decided cases, does require it to be so concluded. In either case, therefore, I think the demurrer must be allowed.

(a) Lord Chief Justice *Tindal* was attending the Privy Council.

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Mr. Justice GASELEE.—It is true that the 126th section of the 6 Geo. 4, c. 16, does not expressly state that the plea thereby given must conclude to the country; neither did the 5 Geo. 1, upon which the case of *Gery v. Baily* was determined; nor the 5 Geo. 2, c. 30, s. 7, which was the enactment in force at the time of the decision in *Miles v. Williams*. The words of the existing enactment are the same in effect; and, on the former provisions, it has been uniformly held that the proper conclusion of the plea is to the country. If, therefore, this be a general plea, it is bad for not so concluding. I am also of opinion that the plea is bad in substance, inasmuch as it does not pursue, as it ought to do, the language of the statute. It is difficult to say whether it was intended for a general or a special plea: if general, it is bad for the reasons stated; if special, it is equally bad, forasmuch as it does not allege sufficient to constitute a special plea of bankruptcy.

Mr. Justice BOSANQUET.—I am also of opinion that the plea is bad. If meant for a general plea under the statute, it should have concluded to the country. The case of *Hedges v. Sandon* has been cited, to shew that the plea might be concluded either way; but there are other cases wherein it has been decided that a general plea of bankruptcy must conclude to the country. *Tower v. Cameron* shews that a case may arise wherein the general plea will not avail. It is clear, however, that, if resort be had to a special plea, the defendant must aver, in addition to other facts, the trading and bankruptcy, and also that he has obtained his certificate. In either view, therefore, this plea is bad.

Judgment for the plaintiff.

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June 19th.ROE *d.* DURANT *v.* DOE, THOMAS MOORE, Tenant.

THIS was an action of ejectment. *Moore*, the tenant in possession, upon his being admitted to defend, besides entering into the common consent rule, and giving the common undertaking, in case the verdict should pass for the lessor of the plaintiff, to give him judgment of the term next preceding the trial, entered also into the recognizance required by the statute 1 *Geo.* 4, c. 87, s. 1, with two sureties, to pay the damages and costs in the action, in pursuance of a rule obtained in the last term on the part of the lessor of the plaintiff^(a). That rule was intitled in the cause of "*Roe d. Durant v. Doe*," and the recognizance, which was taken before commissioners in the country, in this respect followed the rule.

In ejectment, where the tenant has been admitted to defend, and has entered into the recognizance, to pay damages and costs, in pursuance of the statute 1 *Geo.* 4, c. 87, s. 1, in intitling such recognizance, the name of the tenant should be inserted in place of that of the original nominal defendant.

Mr. Serjeant *Wilde*, on the part of the lessor of the plaintiff, now moved that the recognizance should be altered.—The recognizance ought to have been in the names of the parties to the suit at the time it was taken; for, when the tenant was admitted to defend, he became the real defendant in the cause. From that time the issue to be tried was between the lessor of the plaintiff and *Moore*. The judgment would be against *Moore*, and not against *John Doe*. The rule for entering into the recognizance was prospective, upon *Moore's* being admitted to defend.

Mr. Serjeant *Cross*, *contra*.—The recognizance was properly intitled in the same manner as the rule of the Court. There is, consequently, no foundation for the objection. The variance, if any, is not material; and the defendant is not bound to amend.

(a) *Ante*, p. 391.

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Lord Chief Justice TINDAL.—The intitling the recognizance is the act of the officer of the Court. With the consent of the parties, the name of "*John Doe*" may be expunged.

Mr. Justice PARK.—Will the *bail* consent? I think the recognizance should be re-acknowledged after the alteration.

The Court directed that inquiry should be made as to the practice of the Court of *King's Bench* upon the subject; and, upon Mr. Serjeant *Cross's* afterwards stating that no instance had occurred in that Court, it was ordered that the recognizance should be amended and re-acknowledged.

Rule accordingly.

WILLIAMS v. PAUL.

Saturday,
 June 19th.

Where a contract for the sale of goods, which have been delivered to and retained by the purchaser, is void by reason of its having been made on a Sunday, a subsequent promise to pay will entitle the vendor to recover the value upon a *quantum meruit*.

THIS was an action of *assumpsit* to recover the sum of 32*l.*, the value of three cows and a heifer sold to the defendant under the following circumstances:—

The plaintiff was a *Welsh* grazier, the defendant a farmer. A drover employed by the former, arriving late one *Saturday* evening in the defendant's neighbourhood, put up his cattle for the night in one of his fields. On the same evening the defendant entered into a treaty with the drover for the purchase of the beasts in question, for which the drover asked 32*l.* After some disputing about the price, the plaintiff agreed to purchase them *if he liked them in the morning*. Accordingly, on the *Sunday* morning, the defendant inspected and approved of the beasts, but refused to give the price demanded. The drover thereupon went on his way; and when he had proceeded

three or four miles, he was overtaken by a servant of the defendant, who drove back the three cows and heifer.

At the trial, before Mr. Justice *Bayley*, at the last Assizes for the county of *Sussex*, it was contended, on the part of the defendant, that the contract, having been completed on the *Sunday*, was void by the statute 29 Car. 2, c. 7, and consequently that the plaintiff was not entitled to recover. On the part of the plaintiff, a witness of the name of *Davis* was called, who proved that he saw the plaintiff and defendant together at a market town in *Sussex*; and that, on the plaintiff's demanding of him the price of the beasts, he promised that he would pay the amount to Mr. *Cotton*, at the *Swan* Inn there, before the plaintiff came there again; and it was contended that this subsequent promise took the case out of the statute.

The learned Judge thought that, as the defendant kept the beasts, and afterwards promised to pay for them, the plaintiff was entitled to recover their value under the *quantum meruit*, though not entitled upon the original contract.

The Jury having found for the plaintiff, for the whole sum, leave was given to the defendant to move to enter a nonsuit upon the above objection, should the Court conceive it to be well founded.

Mr. Serjeant *Andrews*, accordingly, in the last term, obtained a rule *nisi*.—He referred to the case of *Fennel v. Ridler*, where Mr. Justice *Bayley* said (a): "The spirit of the act is to advance the interests of religion; to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion; and the act cannot be construed according to its spirit, unless it is so construed as to check the career of worldly traffic:" and also

(a) 8 Dow. & Ryl. 204; S. C. 5 Barn. & Cress. 406.

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v.

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to the case of *Smith v. Sparrow* (a), where the defendants, through the medium of a broker, contracted for the purchase of goods from the plaintiff; the whole terms of the contract were arranged on a *Sunday*, and on the same day entered in the broker's contract-book (with the exception of the name of the seller, which was added next day), and the sold-note delivered to the defendants—the Court held that the entire contract, being, as far as it affected the defendants, completed on the *Sunday*, was void by the statute: and Lord Chief Justice *Best* said (b): “The statute enacts, that no tradesman, artificer, workman, labourer, or any other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the *Lord's Day*, or any part thereof. These words do not necessarily imply an absolute completion of a contract; any serious proceeding in the making of a bargain is equally within the statute; if the foundation only be laid on a *Sunday*, it is an offence against the act.”

Mr. Serjeant *Bompas* now shewed cause.—The entire contract in this case was made on the *Saturday*, subject only to the defendant's approval on the next morning. A fresh contract on the *Monday* following may be implied from the defendant's retaining the cattle. In *Hill v. Perrott* the Court said (c), “that the law would imply a contract to pay for goods, from the circumstance of their having been the plaintiff's property, and having come to the defendant's possession, if unaccounted for.” It is clear that, where a party holds the goods of another, the law implies a promise to pay for them. Independently, however, of any implication of law, the plaintiff is entitled to recover in this case; for, there was evidence of an express

(a) 12 J. B. Moore, 266; S. C.
 4 Bing. 84.

(b) 12 J. B. Moore, 274.
 (c) 3 Taunt. 275.

promise by the defendant to pay for the beasts. That removes all difficulty with respect to the statute of *Charles*. The cases cited were cases where the contract was clearly completed on the *Sunday*; therefore they cannot apply.

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Mr. Serjeant *Andrews*, in support of his rule.—It is true that the purchase was talked of on the *Saturday* evening, but there was no completion of the bargain until the *Sunday* morning, when the defendant saw and approved the beasts, and afterwards sent his man to follow the drove and bring them back. It is contended, that, as the defendant afterwards kept the beasts, the law will imply a promise on his part to pay for them. But he had no means of returning them; he could not find the drover, who was travelling about the country from place to place. Neither will any subsequent promise set up a contract which is in itself void. Such a doctrine would totally destroy the effect of the statute.

Mr. Justice PARK.—I should be very sorry to be supposed to depart from the rule laid down by both the Courts for the enforcing, as far as the statute (which is however very insufficient) goes, the due observance of the *Lord's Day*. Upon the evidence given at the trial of this cause, I should be of opinion that the contract upon which the action is founded was made on a *Sunday*. It is true the bargain was commenced on a *Saturday*; but the parties came to no conclusion on that day. The beasts were approved and actually bought upon the *Sunday* morning, when they were brought back to the defendant's yard. The rest of the Court concur with me in thinking that the contract was made on the *Sunday*. But the ground upon which I think the plaintiff entitled to recover, is, the defendant's subsequent promise to pay. The evidence upon this point was, that the witness (*Davis*) saw the plaintiff

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and defendant together at a market town in *Sussex*, and that, when the plaintiff demanded the price of the beasts, the defendant said he would pay the money to Mr. *Cotton*, at the *Swan* Inn, before the plaintiff came there again. I am therefore of opinion, with my Brother *Bayley*, that the plaintiff was entitled to recover on the count upon a *quantum meruit*.

Mr. Justice GASELEE.—I am also of opinion that this rule ought to be discharged. I entertain not a shadow of doubt but that the contract in this case was made on the *Sunday*. I am not prepared to go the length of saying that the mere subsequent retainer of the goods creates an implied liability on the part of the purchaser on a *quantum meruit*; for that would altogether destroy the effect of the statute of *Charles*. If the plaintiff had demanded the beasts in this case, and the defendant had refused to deliver them up to him, I think the plaintiff would be entitled to bring trover. The ground, however, upon which I rest my opinion in this case is, that the defendant, subsequently to the making of the contract, promised to pay for the cattle.

Mr. Justice BOSANQUET.—I am of the same opinion. I fully concur with the ruling of Mr. Justice *Bayley*. It is perfectly clear that a party is not bound by a contract made on a *Sunday*; and I think that the original contract in this case was void on that ground. There was, however, a subsequent promise to pay: and although the defendant was not bound to pay the sum originally agreed upon as the price of the beasts; yet, as the Jury have found the value, I think there is no ground for disturbing the verdict.

Rule discharged.

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Monday,
June 21st.

WILSON v. BIDEN and Another.

A rule was obtained by Mr. Serjeant *Wilde*, on a former day in this term, calling on the plaintiff to shew cause why the proceedings against the bail should not be set aside, on the ground that they had had no notice of the proceedings, the two writs of *scire facias* and *alias scire facias*, having been returned *nihil* at the request of the plaintiff's attorney, who told the under-sheriff, at the time he desired the returns of *nihil* to be made, that *he was afraid the proceedings would come to the knowledge of the bail*.

The plaintiff's attorney left two writs of *sci. fa.* at the Sheriff's office, and directed that they should be returned *nihil*, at the same time expressing apprehension lest the proceedings should come to the knowledge of the bail:—The Court, at the instance of the bail, ordered the proceedings to be set aside.

Mr. Serjeant *Taddy*, *contra*, contended that the bail were not entitled to notice, but were bound to watch the proceedings, which in this case were strictly in accordance with the established practice.

Lord Chief Justice TINDAL.—Whatever the practice upon this subject has hitherto been, it is time it should be altered. It appears in this case that there has been collusion between the plaintiff's attorney and the under-sheriff, to cause the proceedings so to be conducted that the defendant's bail might have no notice. On that short ground therefore I think this rule should be made absolute.

Mr. Justice GASELEE referred to *Beddington v. Beddington* (a).

The rest of the Court concurring—

Rule absolute.

(a) *Ante*, Vol. 2, p. 479.

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Tuesday,
June 22nd.

WOMERSLEY v. BOUSFIELD.

A prisoner charged in execution for a debt under 300*l.*, and afterwards for another debt of 500*l.*, may still be brought up under the compulsory clauses of the Lords' Act, at the suit of the execution-creditor.

A motion was made by Mr. Serjeant *Andrews*, on a former day in this term, on the part of the plaintiff, that the defendant, a prisoner in execution at his suit for a debt not amounting to 300*l.*, might be brought up under the compulsory clauses of the Lords' Act (*a*), with a view to his making the usual assignment of his estate and effects.

Mr. Serjeant *Bompas*, on a subsequent day (the 15th instant), appeared on behalf of the prisoner, and stated that, on the preceding day, he had been charged in execution, at the suit of another creditor, for a debt of 500*l.* He submitted that the Court therefore had no jurisdiction over the prisoner, inasmuch as he was only entitled to the benefit of the act when charged in execution for less than 300*l.*: and he contended that the consequence of the Court allowing the motion would be to deprive the debtor of his whole substance on account of the first execution, and still leave him at the mercy of the second.

[Lord Chief Justice *Tindal*.—At the time the motion was made, the second execution was not issued.]

There being a suspicion that the second execution was fraudulent, the Court ordered the matter to stand over until this day.

Mr. Serjeant *Andrews* now referring to the case of *Chappell v. Ashley* (*b*), where it was held by the Court of *King's Bench*, that, where a person is in execution for a particular debt under 300*l.*, he is liable to be brought up under the compulsory clauses of the Lords' Act, at the instance of that particular creditor, although the aggregate

(*a*) See 32 *Geo.* 3, c. 28, ss. 16, 17; and also the 33 *Geo.* 3, c. 5.

(*b*) 5 *Barn. & Ald.* 537, 749; *S. C.* 1 *Dow. & Ryl.* 25, 394.

amount of the debts for which he is charged in execution exceeds that sum—

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Mr. Serjeant *Bompas* admitted that he could not oppose the motion.

Mr. Justice PARK.—The whole Court are of opinion, that, on the words of the act, independently of the authorities (which they conceive to be unanswerable), the prisoner must comply with the statute.

Rule absolute.

Mr. Serjeant *Bompas* then prayed that the prisoner might be remanded, in pursuance of the statute. He referred to *Langdon v. Rossiter* (a) where it was held that the statute gives no authority to remand a prisoner who refuses to submit, otherwise than generally.

A prisoner brought up under the compulsory clauses of the Lords' Act, in *Trinity Term*, and remanded, was ordered to be brought up again in the following term, notwithstanding that more than the sixty days allowed by the statute would then have elapsed.

Mr. Justice PARK.—The statute allows sixty days. It may be a question whether this period should commence from the day on which the prisoner first appeared in Court, or from the day the case was disposed of; I incline to think from the latter: but, as the sixty days will expire in the vacation (b), the prisoner must, unless he in the

(a) M'Clel. 6; S. C. 13 Price, 186.

(b) Mr. Serjeant *Adams* (*Amicus Curie*) mentioned a case that occurred at *Northampton*, where a prisoner was brought up at one Assizes, and transported at the next—probably the case of *Rex v. Belk*, 7 Dow. & Ryl. 234. There, an insolvent was brought up at the Assizes under the clauses in

question, and, not being prepared to deliver in a schedule of his estate, he was remanded generally; but, as more than sixty days would have elapsed before the next Assizes, the Court, at the instance of the prisoner, made an order upon the gaoler to bring him up at the next Assizes for examination, notwithstanding the lapse of the sixty days.

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mean time comply with the statute, be brought up next term.

The prisoner was accordingly remanded (a).

(a) On the prisoner's being brought up in the course of Michaelmas Term following, affidavits were produced to shew (as indeed his appearance sufficiently indicated) that he was insane.

Tuesday,
 June 22nd.

The law implies a duty in the owner of a vessel, whether a general ship, or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

The defendant received on board his barge certain lime to be conveyed for the plaintiff from *Bewly Cliff* to *London*. The master deviated from the usual and customary course of the voyage, without any justifiable cause, and, whilst the barge was so out of her course, she encountered

DAVIS v. GARRETT.

THIS was an action on the case against the owner of a barge, for the loss of goods, occasioned by the master's deviating from the ordinary course of the voyage.

The declaration stated—That, theretofore, to wit, on the 22nd *January*, 1829, at *London* &c., the plaintiff, at the special instance &c. of the defendant, delivered to the defendant on board a certain barge or vessel of the defendant, called the *Safety*, and the defendant then and there had and received in and on board of the said barge or vessel from the plaintiff, a large quantity, to wit, 114½ tons of lime of the plaintiff, of great value, to wit, of the value of 100*l.*, to be by the defendant carried and conveyed in and on board the said barge or vessel from a certain place, to wit, *Bewly Cliff*, in the county of *Kent*, to the *Regent's Canal*, in the county of *Middlesex*, the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever, excepted, for certain reasonable reward to

a storm, and the sea communicating with the lime caused it to ignite, whereby the barge and cargo were lost. In an action on the case for the loss of the lime, the declaration alleged that "it was the duty of the defendant to have carried and conveyed the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same," and averred the loss to be "by reason of the deviation and departure, and delay and detention out of such usual and customary course and passage:—*Held—first*, that the damage sustained by the plaintiff was sufficiently proximate to the wrongful act of the defendant, to form the subject of an action—*secondly*, that the declaration was sufficient to support a judgment for the plaintiff.

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be therefore paid by the plaintiff to the defendant; that the said barge or vessel, afterwards, to wit, on &c., at &c., departed and set sail on the said intended voyage, then and there having the said lime on board of the same to be carried and conveyed as aforesaid, except as aforesaid; and it thereby then and there became and was the duty of the defendant to have carried and conveyed the said lime on board of the said barge or vessel from *Bewly Cliff* to the *Regent's Canal*, the act of God and such other things excepted as were above mentioned to have been excepted, by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same: but the defendant, not regarding his duty in that behalf, but contriving and wrongfully intending to injure and prejudice the plaintiff in that respect, did not carry or convey the said lime on board of the said barge or vessel from *Bewly Cliff* aforesaid to the *Regent's Canal* aforesaid, although not prevented by the acts, matters, or things excepted as aforesaid, or any of them, by and according to the direct, usual, and customary way and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same, but, on the contrary thereof, afterwards, and before the arrival of the said barge or vessel as aforesaid at the *Regent's Canal*, the said defendant, by one *John Town*, the master of the said barge or vessel, and the agent of the defendant in that behalf, to wit, at &c., without the knowledge and against the will of the plaintiff, voluntarily and unnecessarily deviated and departed from and out of such usual and customary way, course, and passage, with the said barge or vessel so having the said lime on board of the same, to certain parts out of such usual and customary course and passage, to wit, to a certain place called the *East Swale*, and to a certain place called *Whitstable Bay*, and did then and there voluntari-

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act of deviation, and the owners were held liable for the loss of the cargo.

It has been contended that there is, in the declaration, no allegation of any duty, so as to make the defendant chargeable. In *Max v. Roberts*, the declaration stated that the defendants, being owners of the ship at *Liverpool*, bound on a voyage from thence to *Waterford*, the plaintiff shipped goods on board, to be carried upon the said voyage by the defendants, and to be delivered at *Waterford* to the plaintiff's assigns; whereupon the plaintiff insured the goods at and from *Liverpool* to *Waterford*; that it was the duty of the defendants, as such owners, to cause the ship to proceed on the voyage from *Liverpool* to *Waterford* without deviation: and alleged as a breach of such duty, their causing the ship to deviate from the course of that voyage, after which she was lost with the goods; and the plaintiff, by reason of such deviation, lost his goods and the benefit of his policy, &c.—it was held that the count could not be sustained, for want of alleging *that the goods were delivered to or received by the defendants for the purpose of carriage, or that they had notice of the shipment*, from whence a promise or duty, founded upon an agreement to carry the goods, might be inferred; and also for want of an allegation *that the defendants undertook to carry the goods directly from Liverpool to Waterford*; for, though the ship's ultimate destination might be *Waterford*, yet, she might have been first destined to other places, on a coasting voyage. Lord *Ellenborough* there said (a): "The first count of the declaration alleges a shipment by the plaintiff of goods on board a vessel of which the defendants are stated to be owners; but it does not proceed to state that such goods were delivered to or received by the defendants, or that the defendants in any manner ever had notice of the fact of such shipment. So

(a) 12 East, 94.

that in this count there is not only a want of any words importing a promise by the one party to the other, but there is also an entire absence of all circumstances or facts from which any promise or agreement could be implied, or duty inferred between them in respect to such goods." Here, however, the declaration does allege that the lime was delivered to the defendant at his request, and received by him for the purpose of being carried from *Bewly Cliff* to the *Regent's Canal*, and that it thereby then and there became and was the duty of the defendant to carry and convey the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same; and assigns for breach, that the defendant did not carry or convey the said lime by and according to the direct, usual, and customary way and passage, but voluntarily and unnecessarily deviated and departed from and out of such usual and customary way, course, and passage; and then avers the loss to have been consequent on such deviation. It is not necessary that there should be an express contract on the part of a carrier to carry according to the usual and ordinary course. The second part of the judgment in the case of *Max v. Roberts*, if it be law (which may be doubted), cannot apply here, inasmuch as the entire cargo belonged to the plaintiff. In *Abbott on Shipping* it is said (a): "Having commenced his voyage, the master must proceed to the place of destination without delay, and without stopping at any intermediate port, or deviating from the straight and shortest course, unless such stopping or deviation be necessary to repair the ship from the effects of accident or tempest, or to avoid enemies or pirates, by whom he has good reason to suspect that he shall be attacked if he

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(a) 5th edit. 239.

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proceeds in the ordinary track, and whom he has good reason to hope that he may escape by delay or deviation; or unless the ship sail to the places resorted to in long voyages for a supply of water or provisions, by common and established usage:" and in a note the learned Editor of that work says: "The text was intended to apply to the case of a ship destined to one place only. If the ship be destined to several places, the master should sail to them in the usual or designated order. I apprehend this doctrine is not contrary to the decision of the Court of Error in the case of *Max v. Roberts*. That case was decided upon the form of the declaration, which averred only that the ship was bound from *Liverpool* to *Waterford*; and as this averment was not inconsistent with the fact of her being bound to other intermediate places, it was insufficient to found the subsequent allegation, that it was the duty of the owners to cause the ship to proceed from *Liverpool* to *Waterford*, without any unnecessary deviation from the course of the said voyage."

Mr. Serjeant *Taddy*, in support of his rule.—On the evidence there was nothing to shew that the loss of the lime was so proximate to the wrongful act of the defendant, *vis.* the deviation, as to form the subject of an action. *In jure, causa proxima, non remota, spectatur.* The immediate cause of the loss here was the storm. It appears that the master took one of two courses, though, as the verdict finds, not the most prudent course; that, whilst in the act of so deviating, he encountered a storm, which caused the sea to communicate with the lime, whereby the lime ignited and set fire to the barge, and both barge and cargo were lost. The barge might, however, have been overtaken by the same storm had she pursued the other course. It is impossible, therefore, to say that the mere act of deviation was the proximate cause of the loss.

At all events, the declaration discloses no sufficient

cause of action. In *Dale v. Hall* (a) Mr. Justice *Denison* says:—"The declaration upon the custom of the realm is the same in effect with the present declaration; in the old form it is, that the defendant *suscepit*, &c., which shews that it is *ex contractu*." And, in *Powell v. Layton* (b), Sir *James Mansfield* said:—"The word *duty* is introduced into this declaration; but, let us see what is meant by the defendant's duty. How did he undertake any duty, except by his agreement to carry and deliver the goods? The duty of a servant, and the duty of an officer, I understand; but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract." Inasmuch, therefore, as the defendant's duty arises out of the contract, it must necessarily be limited by it. The form of the declaration in *Max v. Roberts* was the same as that in this case.

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Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

There are two points for the determination of the Court upon this rule—*first*, whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action—*secondly*, whether the declaration is sufficient to support the judgment of the Court for the plaintiff.

As to the first point, it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration, without any justifiable cause; and that, afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master

(a) 1 Wils. 282.

(b) 2 New Rep. 365.

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was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were entirely lost.

Now, the first objection on the part of the defendant is not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for, it is obvious that the legal consequences must be the same, whether the loss was immediate, by the sinking of the barge at once by a heavy sea when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's-wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case. But the objection taken is, that there is no natural or necessary connexion between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course.

If this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover; for, if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course: and yet, in *Parker v. James* (a), where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her direct and ordinary voyage.

(a) 4 Camp. 112.

The same answer might be attempted to an action against a defendant who had by mistake forwarded a parcel by the wrong conveyance, and a loss had thereby ensued: and yet the defendant in that case would undoubtedly be liable.

But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action, the bare possibility of a loss if such wrongful act had never been done. It might admit of a different construction, if he could shew, not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done: but there is no evidence to that extent in the present case.

Upon the objection taken in arrest of judgment, the defendant relies on the authority of the case of *Max v. Roberts* (a). The *first* ground of objection upon which the judgment for the defendant in that case was affirmed, is entirely removed in the present case; for, in this declaration it is distinctly alleged that the defendant had and received the lime in and on board of his barge, to be by him carried and conveyed on the voyage in question. As to the *second* objection mentioned by the learned Lord Chief Justice, in giving the judgment in that case, *viz.* that there is no allegation in the declaration that there was an undertaking to carry *directly* to *Waterford*, it is to be observed, that this is mentioned as an additional ground for the judgment of the Court, after one in which it may fairly be inferred, from the language of the Lord Chief Justice, that all the Judges had agreed, and which first objection appears to us amply sufficient to support the judgment of the Court. We cannot, therefore, give to that *second*

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(a) 12 East, 89.

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reason the same weight as if it were the only ground of the judgment of the Court. And, at all events, we think there is a distinction between the language of this record and that of the case referred to. In the case cited, the allegation was, that it was the duty of the defendant to carry the goods directly to *Waterford*; but here, the allegation is, "that it was his duty to carry the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation and departure." The words "usual and customary" being added to the word "direct," more particularly where the breach is alleged in "unnecessarily deviating from the usual and customary way," must be held to qualify the meaning of the word direct, and substantially to signify that the vessel shall proceed in the course usually and customarily observed in that her voyage: and we cannot but think that the law does imply a duty on the owner of a vessel, whether a general ship, or hired for the special purpose of the voyage, to proceed without unnecessary deviation, in the usual and customary course.

We, therefore, think that the rule should be discharged, and that judgment should be given for the plaintiff.

Rule discharged.

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Tuesday,
June 22nd.

POTT v. TURNER and Another.

THIS was an action of *assumpsit* brought by the plaintiff to recover from the defendants the amount of a deposit made by him on the purchase of an estate.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall* after the last *Hilary* Term. The principal point at issue was, whether one *Thomas Baker*, the person from whom the defendants derived title, was a trader subject to the bankrupt laws—the property in question having been assigned by him to the defendants in trust for the benefit of his and his brother's creditors. It appeared that the two *Bakers* had for many years carried on the business of ship-brokers in partnership, under the firm of *Thomas Baker & Sons*. The brother of the assignor, *John Henry Baker*, being called as a witness, stated that they had carried on the business of ship-agents or brokers, procuring charters, freights, and passengers for vessels, on commission; that, during the war, they were also ship-owners, but had since sold their ships, and confined themselves solely to the agency business; and that, during the whole time they had been in business together, they had never bought or sold goods for profit, nor had they acted as insurance-brokers. He further stated, that all the creditors under the joint estate, whose debts amounted to 20*l.*, had agreed to accept a composition, and to release them, in consideration of the above assignment by *Thomas Baker* to the defendants; but it did not appear that the release had in fact been executed by all.

A verdict was taken for the plaintiff for 150*l.*, subject to a motion to enter a nonsuit, if the Court should be of opinion that *Thomas Baker* was not a trader subject to the bankrupt laws.

Mr. Serjeant *Wilde*, in the last term, accordingly obtain-

A ship-broker is subject to the bankrupt laws, falling within the description in the 2nd section of the 6 *Geo.* 4, c. 16—"bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's moneys or estates into their trust or custody."

A purchaser is not bound to take a doubtful title. Therefore, where the vendors derived title under an assignment made by a party for the benefit of his creditors, in itself an act of bankruptcy:—*Held*, that they could not compel the purchaser to accept the title, without proof that there was no creditor in a situation to sue out a commission against the assignor.

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ed a rule *nisi*, in pursuance of the above reservation; and also on the ground that it was not shewn that, even if *Thomas Baker* was subject to the bankrupt laws, there was any creditor who was in a situation to sue out a commission against him.

Mr. Serjeant *Cross* now shewed cause.—From the evidence, it appears that the business carried on by the two *Bakers*, was that of ship-brokers, which consists in procuring charters, freights, and passengers for ships, and paying over to their employers the moneys received by them, after deducting their commission; and the principal question is, whether a ship-broker is a broker within the meaning of the 6 *Geo. 4*, c. 16, s. 2, which enacts, “that all bankers, *brokers*, and persons using the trade or profession of a scrivener, receiving other men’s monies or estates into their trust or custody, shall be deemed traders liable to become bankrupts.” The words, “receiving other men’s monies or estates into their trust or custody,” were not intended to be confined to scriveners, but equally apply to the three descriptions of persons named. A banker is held liable to the operation of the bankrupt laws, only because he receives other men’s monies into his trust or custody. In *Rawlinson v. Pearson* (a), a pawn-broker was held to be a broker within the meaning of the act.

It is clear that there was a sufficient act of bankruptcy on the part of *Thomas Baker*, provided he was a trader within the meaning of the statute, and there was any creditor capable of becoming a petitioning-creditor: but it is contended that the plaintiff has not shewn that there was such a person. It was, however, incumbent on the defendants, who have undertaken to deduce a clear title, to satisfy the purchaser that the party from whom their title was derived, was not in a situation to be made a bank-

(a) 5 Barn. & Ald. 124.

rupt. It was for them to prove that there was no creditor who could sue out a commission against him; otherwise they cannot be said to have deduced a clear title. In *Lowes v. Lush* (a), the bill prayed a specific performance of an agreement by the defendant for a purchase from the plaintiff. Under the usual reference as to the title, an objection was taken, on behalf of the purchaser, upon a deed executed by the plaintiff with a view to the sale, as amounting to an act of bankruptcy; being an assignment of all his effects. Upon that ground an exception was taken by the defendant to the Master's report in favour of the title, the plaintiff in his examination having sworn that he owed no debt upon which a commission of bankruptcy could issue. The Master of the Rolls there said: "If a trader has committed an act of bankruptcy, a very serious question arises, whether the Court will oblige a purchaser to take the title from him upon the mere possibility that the act of bankruptcy may never produce any effect. Many acts of bankruptcy have been committed without any consequences from them, by which a purchaser could be affected; but, until the time fixed by the act of Parliament has expired, it is extremely difficult to give him any assurance that he has got an available title: not merely a marketable title; but one which he can take with reasonable safety. If the plaintiff can with precision ascertain that there is no creditor who can take out a commission, there is an end of the force of the objection: but the difficulty is, by what process that can be ascertained. It is truly stated, that, even under a reference to inquire what debts were owing by the plaintiff at the time when he executed this deed, a report that there were none would not give an assurance. What obligation is there upon any creditor to come in before the Master: how, by not coming in, would he be barred from the remedy which the law gives him, of tak-

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(a) 14 Ves. 547.

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ing out a commission? A report, then, that no creditor had appeared upon the advertisement, would not give security to the title. Therefore, though it is very important for the plaintiff, who has entered into a fair agreement, yet it would be as hard on the other hand that the purchaser should be obliged to take a title which the Court cannot warrant to him." The exception was accordingly allowed, and the bill dismissed. Neither in law nor in equity is a purchaser bound to take a doubtful title. *Wilde v. Fort* (a), *Hartley v. Smith* (b).

Mr. Serjeant *Wilde*, in support of his rule.—The principles upon which Courts of equity compel specific performance of purchase-agreements, have nothing whatever to do with the question, whether the agreement be legal and capable of being enforced in a Court of law. In *Lowes v. Lush*, the Court refused to compel a specific performance under circumstances which a Court of law could not take cognizance of: and in *Wilde v. Fort*, the title appeared to be bad with reference to the particular facts of the case; it was incumbent on the vendor to remove the difficulty that existed as to the question of dower. Here, however, there is a *bond fide* conveyance from a party capable of conveying, made more than twelve months prior to the objection being taken.

The words of the act, "receiving other men's monies or estates into their trust or custody," were clearly intended to apply only to *scriveners*; for, those are the words used in describing scriveners in the first statute in which they are introduced, *viz.* the 21 *Jac.* 1, c. 19. A broker is a person sanctioned by act of Parliament to make bargains between buyer and seller. It is no part of his duty to receive into his trust or custody other men's monies or estates. The business of a scrivener, on the contrary, is ex-

(a) 4 Taunt. 334.

(b) Buck, 368.

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pressly confined to the dealing with money. The proper business of a ship-broker is the buying and selling of ships; though they also, as agents, receive freights, make bargains for charters, and do other acts not confined to their proper trade. In *Gibbons v. Rule* (a), a ship-broker, or one who obtains on commission freights and passengers for vessels, was held not to be a *broker* within the statutes regulating the admission of brokers for the city of *London*.

The conveyance made by *Thomas Baker* for the benefit of his creditors, constitutes an act of bankruptcy only upon its being shewn that there has been excluded from participation in the fruits of it a creditor who could take advantage of it. The *onus* of shewing that rests upon him who would establish the liability of the party to be made a bankrupt.

Lord Chief Justice TINDAL.—This action is brought to recover a deposit paid by the plaintiff to the defendants upon a contract for the sale of an estate. The question is, whether the defendants are in a condition to make out a good title to the purchaser. That principally depends upon whether or not the party conveying to them was a person subject to the bankrupt laws. A subordinate question has also arisen in the course of the argument, *viz.* whether, supposing the person from whom the defendants derived title to have been subject to the bankrupt laws, there was any creditor in a situation to take advantage of it.

The first question, *viz.* whether or not *Thomas Baker* was a person liable to the bankrupt laws, depends upon the words of the 2nd section of the statute 6 Geo. 4, c. 16, which enacts “that all bankers, *brokers*, and persons using the trade or profession of a scrivener, *receiving other*

(a) 12 J. B. Moore, 539; S. C. 4 Bing. 301.

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men's monies or estates into their trust or custody, and persons insuring ships or their freight, or other matters, against the perils of the sea, shall be deemed traders liable to become bankrupt." It has been contended, on the part of the defendant, that, whether the words of this section be taken together or separately, *Thomas Baker* is not brought within the enactment—that he was not a broker within the meaning of the act. Undoubtedly the term broker, taken strictly, means a person who makes contracts or bargains between merchant and merchant, for the purchase or sale of goods, receiving a commission for his trouble; or a stock-broker who makes bargains for the sale of stock. In its general application, however, it has a more extensive signification. In common parlance, a ship-broker is one who negotiates for the procuring of charters, freights, and passengers for ships; and he comes within the general understanding of the term broker. In *Rawlinson v. Pearson* (a) a pawn-broker was held to be a trader subject to the bankrupt laws, and yet it is perfectly clear that a pawn-broker is not a person who makes contracts for others; he is merely a person receiving from others deposits of goods at interest. I think we shall not be going beyond the act when we hold a ship-broker to be within its operation. I should have strongly felt the argument urged on the part of the defendant, if the question had depended solely upon the words of the statute 21 Jac. 1, c. 19; for, when scribes are there for the first time introduced into the statutory law for the regulation of bankrupts, they are described as persons "receiving other men's estates into their care." In the 5 Geo. 2, c. 30, s. 39, however, the same description is given of a broker. The words of the clause are—"And whereas persons dealing as bankers, *brokers*, and factors, are frequently intrusted with great sums of money and with

(a) 5 Barn. & Ald. 124.

goods and effects of very great value belonging to other persons: it is hereby further enacted, that such bankers, brokers, and factors shall be and are hereby declared to be, subject and liable to this and other the statutes made concerning bankrupts." When, therefore, we come to the new act, and find that it unites in the one term, "bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody," I do not see why these latter words should not be held to apply to all the three descriptions of persons therein mentioned. This was the opinion of the Judges in *Rawlinson v. Pearson*. Mr. Justice *Holroyd* there said (a): "Lord *Hardwicke's* opinion in *Highmore v. Molloy* (b) having been delivered within a very few years after the statute 5 Geo. 2, c. 30, raises a strong inference, that, at that time, pawn-brokers were considered as a species of brokers; and that they therefore came within the statute. The 39th section of the statute 5 Geo. 2, c. 30, is not merely an enacting clause; but, after reciting 'that persons dealing as bankers, brokers, and factors, are frequently intrusted with great sums of money, and with goods belonging to other persons,' declares the persons coming within that description to be subject to that and the other statutes made concerning bankrupts. Lord *Hardwicke's* opinion being that pawn-brokers are a class of brokers, and it appearing by the 39th section of the statute, that brokers are within the provisions of the prior bankrupt laws, I think that a pawn-broker is clearly within the intent of that statute."

It appears that the two *Bakers* had for many years carried on the business of ship-brokers, procuring on commission freights and passengers for vessels, and consequently receiving into their trust and custody monies of other per-

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(a) 5 Barn. & Ald. 131.

(b) 1 Atk. 206.

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sons. I therefore think they must be considered to have been *brokers* within the meaning of the act.

With respect to the second question—whether, admitting *Thomas Baker*, the person under whom the vendors of the estate derived title, to have been a trader subject to the bankrupt law, there was any person to whom he was sufficiently indebted to allow of a commission being sued out against him—the brother, who was called as a witness, said that there was no creditor upon the joint estate capable of being a petitioning-creditor; but it does not follow that there was none upon the separate estate of *Thomas Baker*. Upon the whole, therefore, I think it does not appear with sufficient certainty that there was not a creditor of *Thomas Baker* who might enforce the act against him; and consequently that we must be governed by the case of *Lowes v. Lush*, where the Master of the *Rolls* refused to enforce a contract of purchase, because the title was liable to be questioned by reason of the vendor being subject to the bankrupt laws. I am therefore of opinion that there is no ground for disturbing the verdict.

Mr. Justice PARK.—I am of the same opinion. In common parlance a ship-broker falls within the general term broker. It is part of his business to receive other men's monies into his trust and custody. He is clearly as much subject to the bankrupt law as a pawn-broker. The case of *Rawlinson v. Pearson* was very ably argued, and decided upon the most mature deliberation; the Court mainly relying upon the decision of Lord *Hardwicke* in *Highmore v. Molloy* (a), where a pawn-broker was held to be a broker within the statute 5 *Geo. 2*, c. 30. There was also a case from the *Common Pleas* at *Lancaster*, ruled to the same effect by Mr. Baron *Wood*. I am clearly of opinion

(a) 1 *Atk.* 206.

that the latter words of the 2nd section of the late act—“receiving other men’s monies or estates into their trust or custody”—apply to brokers as well as to scriveners. The Legislature evidently intended that description to apply to all the three classes of persons mentioned. The preamble of the clause in the 5 *Geo. 2*, c. 30, wherein the description given to scriveners in the 21 *Jac. 1*, c. 19, was first applied to brokers, recites that “Whereas persons dealing as bankers, *brokers*, and factors, are frequently intrusted with great sums of money, and with goods and effects of great value belonging to other persons.” The 6 *Geo. 4*, c. 16, s. 2, following that enactment, provides, “that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men’s monies or estates into their trust or custody, &c., shall be deemed traders liable to become bankrupt.” It is, I conceive, impossible to entertain a doubt upon the true meaning of that clause. A ship-broker is clearly within its operation.

With respect to the second point also I agree with my Lord Chief Justice. The witness only negatived the existence of any demand upon the joint estate of his brother and himself, in respect of which the former might be made a bankrupt. It was not shewn that there were no separate debts. A purchaser is not bound to take a doubtful title. This is at the best doubtful.

Mr. Justice GASELEE.—If there were any substantial doubt as to the meaning of the term broker as used in the 2nd section of the 6 *Geo. 4*, c. 16, it will be dispelled by a reference to the language of the previous enactment on the subject in the 5 *Geo. 2*, c. 30. There, after reciting “that whereas persons dealing as *bankers*, *brokers*, and *factors*, are frequently intrusted with great sums of money, and with goods and effects of great value belonging to other persons,” it is enacted, that *such bankers, brokers,*

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and factors shall be subject and liable to that and other the statutes made concerning bankrupts. It appears to me that a ship-broker falls within the description of a broker "frequently intrusted with great sums of money," and consequently also within the description of persons mentioned in the 2nd section of the 6 *Geo.* 4, c. 16. An insurance-broker has been held to be within the meaning of the 5 *Geo.* 2, c. 30.

A Court of equity would not compel the plaintiff to accept a title so doubtful as this. I am therefore of opinion that the rule should be discharged.

Mr. Justice BOSANQUET.—I concur entirely with the rest of the Court upon both points. *Thomas Baker* clearly carried on the business of a broker within the meaning of the statutes. A ship-broker is one employed in making contracts for the hire or freight of ships, receiving the money arising from those contracts or freights, and handing over the balance after deducting his commission. It has been contended that the words in the 2nd section of the 6 *Geo.* 4, c. 16, "receiving other men's monies or estates into their trust or custody," apply exclusively to scriveners, and the statute 21 *Jac.* 1, c. 19, where that description is so confined, has been referred to in support of that argument. But, in the 5 *Geo.* 2, the same expressions are used as applied to bankers and brokers as well as to scriveners; and the 6 *Geo.* 4, c. 16, s. 2, combining all these three classes together, enacts, "that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, shall be deemed traders liable to become bankrupt."

If, therefore, *Thomas Baker* be (as I conceive he is) a broker within the meaning of the statute, and as such subject to the operation of the bankrupt law, the next question is, whether the defendants have deduced a clear title,

so as to enable them to compel the plaintiff to complete his purchase. As to this it appears that the person from whom their title is derived was a trader, and subject to the bankrupt law; that he has executed a conveyance of all his property to his creditors, which is of itself an act of bankruptcy, provided there still remains a creditor unsatisfied, whose debt is of sufficient magnitude to enable him to sue out a commission thereon. The defendants, not having satisfied the purchaser that there was no such creditor, have not I think deduced a clear title. It does not appear that all the creditors have executed the agreement of release. This rule must therefore be discharged.

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Rule discharged.

LANCASTER and Another v. CHRISTOPHER HARRISON.

Tuesday,
 June 22nd.

THIS was an action of *assumpsit* to recover the amount of four several bills of exchange, for 205*l.* 18*s.*, 253*l.* 1*s.* 8*d.*, 250*l.*, and 233*l.* 18*s.* 6*d.*, respectively drawn by the defendant upon and accepted by one *Charles Lewis Harrison*.

By indenture made the 20th *February*, 1828, between *Charles Lewis Harrison* of the first part, the defendant of the second part, the plaintiffs of the third part, and one *Thomas Borrett* of the fourth part—reciting “that the plaintiffs had agreed to discount for *Charles Lewis Harrison* bills of exchange to the amount of 700*l.*, drawn by the defendant upon and accepted by *Charles Lewis Harrison*;

The defendant drew upon his brother, *C. L. H.*, certain bills of exchange, and indorsed them to the plaintiffs, as security for advances made and to be made by them to *C. L. H.* As a further security, *C. L. H.*, by a deed to which the plaintiffs and defendant respectively were parties, assigned to one *B.* the lease of his house, and the fixtures,

furniture, and effects therein, in trust that, at the request of the plaintiffs, *B.* should sell the same, and apply the proceeds in discharge of debts then due or thereafter to become due to the plaintiffs. The deed also contained a proviso that the premises should be sold or offered for sale, and the proceeds, if sold, applied in the manner specified in the deed, before any proceedings should be commenced against the defendant upon the bills. The trustee (with the knowledge of the defendant) never took possession, but *C. L. H.* remained on the premises. The goods of *C. L. H.* were afterwards sold by the assignees appointed under a commission sued out against him:—*Held*, that, under the circumstances, the proviso was no bar to the plaintiffs’ right of action upon the bills.

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that *Charles Lewis Harrison* was indebted to the plaintiffs in the sum of 500*l.* for wine; and that he had agreed to assign the lease of a house in *Russell Street*, with the furniture, fixtures, and other effects in and about the same, for the purpose of securing to the plaintiffs the payment of the said sum of 500*l.*, and of the bills of exchange which they had discounted for him, and any other drafts or bills to be thereafter paid, so as the monies recoverable under the security should not exceed 1,000*l.*—the said *Charles Lewis Harrison* assigned to *Thomas Borrett* the lease of the house in *Russell Street*, and all the furniture, fixtures, and effects therein, upon trust, that, at the request of the plaintiffs, the said *Thomas Borrett* should sell the lease and furniture by public auction or private contract, and apply the proceeds, first, in defraying the expenses of executing the trust, and then in paying and satisfying the plaintiffs the said sum of 500*l.* due to them from *Charles Lewis Harrison* for wine, the said sum of 700*l.* due on the bills of exchange, and the sum to become due on any other drafts or bills which the plaintiffs might thereafter discount or pay for *Charles Lewis Harrison*, with interest on the same: and it was provided, that the premises thereby assigned should be sold or offered for sale, and the produce thereof, if sold, be applied in the manner and for the purposes specified in the deed, before any proceedings shall be commenced by the plaintiffs, or any subsequent indorsees of the bills of exchange, against the said *Christopher Harrison*, his executors or administrators, to compel payment of the bills, or any of them; and that no proceedings should be had on the bills, unless no person should be willing to purchase the premises, or the produce, after such deductions as aforesaid, should be insufficient to discharge the amount of the bills and interest and expenses thereon.”

This deed was not executed by *Borrett*, the trustee, nor had

possession ever been taken by him under it; but *Charles Lewis Harrison* remained upon the premises. In *January*, 1829, an execution was issued against the goods of *Charles Lewis Harrison*, at the suit of the plaintiffs, in an action upon one of the bills. The officer, at his request, remained in possession until the 15th *April* following, when the property was claimed by the assignees appointed under a commission of bankruptcy that had in the mean time been sued out against him. The furniture, fixtures, &c., and the lease, were sold by the assignees, the furniture for 164*l.*, the fixtures for 85*l.*, and the lease for 10*l.* The last-mentioned sum was by them paid over to the plaintiffs; the rest they retained for the creditors under the commission. All these circumstances occurred with the knowledge of the defendant.

At the trial, before Lord Chief Justice *Tindal*, at the Sittings in *London*, after last *Hilary* Term, it was contended, on the part of the defendant, that, according to the proviso in the deed, the present action was premature, for that the plaintiffs had bound themselves not to sue the defendant upon the bills, until the premises had been put up to sale, and the proceeds (if sold) found to be insufficient to discharge the amount of the bills and interest and expenses thereon; meaning (it was insisted) a sale by the trustee named in the deed; and that such proviso was not complied with by the sale by the assignees that had taken place.

His Lordship was of opinion that this was no answer to an action by the plaintiffs, but that the defendant's remedy, if any, could only be against the trustee, in equity, for not promptly acting in pursuance of the trust.

A verdict was thereupon taken for the plaintiffs, for the amount of the bills less the 10*l.* produced by the sale of the lease; and leave was reserved to the defendant to move to enter a nonsuit.

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Mr. Serjeant *Wilde*, in the last Term, accordingly obtained a rule *nisi*.—He submitted that it was for the plaintiffs to put the trustee in motion.

Mr. Serjeant *Taddy* and Mr. Serjeant *Goulburn* now shewed cause—The proviso in the deed constitutes no defence in law, whatever the equitable rights of the defendant may be. A covenant not to sue generally, may be pleaded in bar, because it constitutes a general release; but a covenant not to sue until a particular message should be sold (as in this case), could neither be pleaded in bar nor given in evidence under the general issue: it must be the subject of a cross-action. Neither does the supposed negligence of the trustee afford any ground of defence to this action.

Mr Serjeant *Wilde*, in support of his rule.—The defendant is only a surety, and is therefore entitled to a strict performance of the proviso on the part of the plaintiffs. By that proviso, the defendant, as surety, was not to be charged on the bills, until the happening of a certain event, *vis.* a sale by the trustee. The sale by the assignees was productive of a result very different from that which would have followed a sale by *Borrett*. The deed provides that *Borrett* should sell “at the request of the plaintiffs.” The time of sale was therefore in their discretion, and not in that of the defendant. The sale by the assignees was not a compliance with the proviso. The action therefore is premature, and falls within the principle of *Tatlock v. Smith* (a). There, the defendants entered into an agreement with their creditors that trustees should be appointed for the purpose of settling their affairs, by the collection, sale and division of their estate and effects equally among their creditors; and it was agreed that the trustees

(a) 3 Moore & P. 676; S. C. 6 Bing. 339.

should take a conveyance and assignment of the estate and effects, and manage the defendants' affairs until each creditor should have received full payment of his debt, the surplus to be paid over to the defendants; and the defendants agreed to make a conveyance and assignment of all their estate to the trustees whenever thereunto required—the deed to contain all usual and necessary clauses. The trustees took possession of the defendants' effects, and paid their creditors ten shillings in the pound. A deed of conveyance was prepared, which the trustees called on the defendants to execute, but which they refused to do, as it did not contain a clause of release. At the time the deed was tendered, one of the defendants only was present, and the meeting at which it was produced was adjourned for the purpose of procuring the assent of the other defendant. The plaintiffs, who were creditors, and had signed the deed, and received thereunder ten shillings in the pound upon the amount of their debt, in the mean time sued the defendants for the residue. The Court held the action to be premature, inasmuch as the agreement contemplated a temporary suspension of the right of the creditors to sue, and was still in force. Lord Chief Justice *Tindal* there said (a): “The ground on which I directed the plaintiffs to be nonsuited was, that they were not in a situation to bring this action after the agreement they had entered into, unless they could shew that it was no longer in force, or that it had been broken by the defendants. But there was a total absence of proof of either of these facts. The parties, by entering into the agreement, contemplated a suspension of the plaintiffs' right to sue as creditors, whilst the agreement was in operation.”

Lord Chief Justice *TINDAL*.—The question in this case

(a) 3 Moore & P. 686.

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depends upon the construction of the proviso in the deed of *February, 1828*. *Christopher Harrison*, it appears, was only a surety for certain debts and engagements of his brother. By this proviso it is stipulated, that the premises thereby assigned should be sold or offered for sale, and the produce thereof (if sold) applied in the manner and for the purposes specified in the deed, before any proceedings should be commenced by the plaintiffs, or any subsequent indorsees of the bills of exchange, against *Christopher Harrison*, his executors, &c., to compel payment of the bills, or any of them; and that no proceedings should be had on the bills, unless no person should be willing to purchase the premises, or the produce (after certain deductions) should be insufficient to discharge the amount of the bills, and interest and expenses thereon. It has been contended, on behalf of the defendant, that this proviso operates as an agreement on the part of the plaintiffs that they should not sue the defendant upon the bills, until those events pointed at by the proviso should have taken place; that is, until the premises had been offered for sale, and the produce of that sale applied in the stipulated manner. If we take this proviso according to the letter, it has in fact been complied with. It seems the premises have been put up to sale. But it is argued that a sale by the assignees of *Charles Lewis Harrison* was not the kind of sale contemplated by the proviso; and that it should have been a sale by the trustee named in the deed, for the purposes mentioned in the deed. It seems to me, however, that this affords only a ground of complaint against the trustee; it is a mere non-execution of the trust by him: but it clearly is no answer in point of law to an action brought upon the bills. Upon the whole, it seems to me, that, if there be any remedy for the defendant under this deed, it must be by application to the Court of *Chancery*, either against the trustee, or to enjoin the plain-

tiffs from suing on the bills. I am therefore of opinion that this rule should be discharged.

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Mr. Justice GASELEE (a).—I am of opinion that the rule for entering a nonsuit in this case ought not to be made absolute; for, the proviso in the deed does not amount to a general covenant not to sue, so as to operate as a perpetual bar. In the case of *Dean v. Newhall* (b), it was held, that, if the obligee of a bond covenant not to sue one of two joint and several obligors, and, if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. A passage is there cited from 12 *Modern Reports*, 551, where it is said, “that, if *A.* and *B.* be jointly and severally bound to *C.* in a sum certain, and *C.* covenants with *A.* not to sue him, that shall not be a release, but a covenant; because he covenants only not to sue *A.*, but does not covenant not to sue *B.*; for, the covenant is not a release in its nature, but only by construction, to avoid circuitry of action.” But, although I concur with my Lord Chief Justice in thinking that this rule should be made absolute, still I entertain considerable doubt as to the amount for which the verdict ought to stand; for, it does not appear that it was through any neglect on the part of the defendant that the assignees of *Charles Lewis Harrison* obtained possession of the property.

Mr. Justice BOSANQUET.—I am also of opinion that this rule must be discharged. If the terms of the proviso could be taken to amount to a covenant not to sue for a given time, or until the happening of a given event (c), an action commenced before the stipulated time would undoubtedly be premature, and could not be supported; or, if the trusts

(a) Mr. Justice *Park* was at Chambers.

(b) 8 Term Rep. 168.

(c) See *Tatlock v. Smith*, ante, Vol. 3, p. 676.

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of the deed have not been in due manner carried into execution, that might be a ground for an application to a Court of equity, or for a cross-action, but it clearly could be no bar to the maintenance of this action.

Rule discharged.

Tuesday,
 June 22nd.

UNDERHILL v. Sir T. WILSON, Bart., late Sheriff of
 KENT.

The Sheriff is responsible for the acts of his officer, though not within the strict line of his duty, provided such acts be afterwards assented to or adopted by the Sheriff.

The plaintiff's goods, farming-stock, &c., having been seized under an execution at the suit of one P., the parties, with the assent of the officer, agreed that the latter should remain in possession for a certain period, and that the farm should in the mean time be managed by the plaintiff. The Sheriff in his return took credit for the money laid out

THIS was an action of *assumpsit* brought by the plaintiff against the defendant, the late Sheriff of the county of *Kent*, to recover the balance of money received by him under an execution issued against the effects of the plaintiff, at the suit of one *Thomas Prickett*, after payment of the amount of the levy, King's taxes, rent, &c., and expenses of the execution.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Westminster* after the last term. The facts given in evidence were as follow:—

In the month of *April* or *May*, 1828, an execution issued against the effects of the plaintiff, at the suit of *Prickett*, returnable on the first day of *Michaelmas* Term following, which writ was afterwards delivered to the defendant to be executed, indorsed to levy 418*l.* 12*s.* 4*d.*, besides costs of the writ, Sheriff's poundage, officer's fees, and all other incidental expenses; whereupon the Sheriff issued his warrant to *Richard Hoskins*, his bailiff. The officer accordingly took possession of the plaintiff's goods,


upon the farm; and an action was brought in his name by the under-sheriff, wherein a sum of money was recovered upon a contract entered into by the officer with an in-coming tenant, for the sale of hay, &c., the receipt of which sum was admitted in a letter written by the under-sheriff to the plaintiff's attorney:—*Held*, that this was sufficient evidence of an assenting by the Sheriff to the acts of his officer; and consequently that he was liable to the plaintiff for the surplus proceeds of the goods after satisfying the levy and expenses.

farming-stock, &c. An agreement was afterwards entered into between *Prickett* and *Underhill*, that *Hoskins* should remain in possession until *Michaelmas*, at which time one *Martin* was to become tenant of the farm, the plaintiff in the mean time to continue to manage the farm, as a sale would be more beneficial at that period. The officer agreed to this arrangement, and remained in possession until *Michaelmas*, from time to time supplying the plaintiff with money for the purposes of the farm, and paying wages and expenses; and at the expiration of that time the household furniture was sold by auction. *Martin*, the in-coming tenant, had agreed to take the hay, straw, underwood, manure, &c., at a valuation. They were accordingly valued at 190*l.*, of which *Martin* refused to pay more than 84*l.* 14*s.* 6*d.*

The Sheriff having been ruled to return the writ, returned as follows:—

“ I have levied and made of the goods and chattels of *Henry Underhill* to the value of 750*l.* 13*s.* 4*d.*, out of which I have paid—for rent, 143*l.*—for King’s taxes, 4*l.* 8*s.* 4*d.*—for duty on hops, 49*l.* 9*s.*—for labour and expenses, 145*l.* 11*s.* 4*d.*—for possession and auctioneer’s charges, 48*l.* 10*s.* 7*d.*; and the residue, after deducting therefrom the Sheriff’s legal poundage, I have ready, as by the said writ I am commanded; and the said *Henry Underhill* hath not any other or more goods or chattels in my bailiwick, &c., &c.”

This return was objected to by *Prickett*’s attorney, forasmuch as it only included 84*l.* 14*s.* 6*d.* of the sum at which the hay, straw, &c., were valued to *Martin*. Accordingly, in *Hilary* Term, 1829, an action was commenced by the Sheriff against *Martin*, to recover from him the full amount of the valuation. This action was conducted by the under-sheriff. *Martin* suffered judgment by de-

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fault; and, on the execution of a writ of inquiry, the damages were assessed at 146*l.* 14*s.* 10*d.*, being the amount of the valuation, less a sum of 43*l.* 13*s.* 2*d.* paid by *Martin* to the landlord for rent on the plaintiff's account. The damages and costs were subsequently paid by *Martin*.

On the 23rd *November*, 1829, the following letter was addressed by the under-sheriff to the plaintiff's attorney:—

“ *Prickett v. Underhill.*

“ Sir,—This writ is returned and filed in the proper office, and you will see from that what amount was levied at the time the return was made; since which we have recovered from a Mr. *Martin* a further sum upon a valuation made to him, which must be added to the Sheriff's return as soon as we can settle with the plaintiff, which we have not been able to do. If you are concerned for *Underhill*, you may, on making an appointment, inspect the accounts at our office now in our possession.

“ Mr. *Underhill*, however, who is related to the plaintiff, and for whose accommodation the farm was carried on, knows pretty well the amount of the expenses; he himself having received from the officer and laid out the greater part of the money. Your's &c.

“ *Palmer & France.*”

The Jury returned a verdict for the plaintiff, for 124*l.* Leave having been reserved to the defendant to move to set aside this verdict and enter a nonsuit—

Mr. Serjeant *Spankie*, in *Easter Term* last, accordingly obtained a rule *nisi*.—*Hoskins*, when he became a party to the arrangement entered into between *Prickett* and the present plaintiff, ceased to be the agent of the Sheriff, and became that of the plaintiff. The action, therefore, should have been brought against *Hoskins*. It is laid down in a

variety of cases, that the Sheriff is discharged where there is any dealing with the officer that is inconsistent with his absolute duty. In *Crowder v. Long* (a), the bailiff having acted out of the line of his duty, it was held, that, as between the Sheriff and the execution-creditor, the act of the bailiff was not to be considered the act of the Sheriff, so as to fix the latter with knowledge of the misconduct of his officer. In *Porter v. Viner* (b), it was held that the appointing a special bailiff, or giving special directions to a particular bailiff, discharged the Sheriff. So, in *Pallister v. Pallister* (c), the Sheriff was held to be discharged, by the plaintiff's appointing a special bailiff and agent to manage the sale, although the Sheriff returned that he had sold, and that he had paid the sum illegally deducted for the auction. The only peculiarity in the present case, to distinguish it from *Crowder v. Long*, is, the action brought in the name of the Sheriff. That, however, was a mere continuation of the same agency.

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Mr. Serjeant *Wilde* now shewed cause.—The acts of *Hoskins*, if not done as the agent of the Sheriff, were at all events subsequently recognised and adopted by him. The return embraces the sums expended by *Hoskins*, under the directions of the plaintiff, in the management of the farm: and the letter of the under-sheriff acknowledges the receipt of the money which was recovered from *Martin*, the in-coming tenant, in the action brought against him by the Sheriff upon the contract entered into by him with the officer. The case of *Crowder v. Long* can, therefore, have no application to the present.

Mr. Serjeant *Spankie*, in support of his rule.—The Sheriff is clearly not responsible for acts done by his offi-

(a) 3 Barn. & Cress. 598 S. C.
 3 Man. & Ryl. 17.

(b) 1 Chit. Rep. 613, n.
 (c) Ibid.

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cer out of the strict line of his duty. *Cook v. Palmer* (a), is a distinct authority to shew that the acts of the Sheriff are severable from those of the officer. There, the Sheriff returned to a writ of *fiери facias*, that he had goods which remained in his hands for want of buyers, and it was afterwards agreed between the parties and the officer in possession (in which agreement the Sheriff did not join), that the whole of the goods should be sold for a gross sum, which was more than sufficient to pay the debt: the officer who received the money having become bankrupt—it was held that the Sheriff was not liable for the surplus. Mr. Justice *Bayley* said: “An arrangement was made by the plaintiffs and *Theobald*, authorizing the officer to sell the whole of the goods for a certain sum. Upon that sale the officer was identified with the Sheriff to the extent of the sum to be levied, but no further, his authority to sell to a greater extent not being derived from the Sheriff, but from the plaintiffs and *Theobald*, who thereby made him their agent as to that part of the transaction.”

Lord Chief Justice TINDAL.—The question in this case is, whether this action for money had and received should have been brought against the Sheriff, or against his officer, *Hoskins*, who acted as the agent of the plaintiff. It is contended on the part of the Sheriff, that *Hoskins* alone was liable. Undoubtedly, at the commencement, *Hoskins* was acting solely as the agent of *Underhill* in the management of the farm, and for what was done by him in that capacity the Sheriff is clearly not responsible. The mere act of the return to the writ would not conclude the Sheriff. As between him and the plaintiff, he could not avoid making the return. But that which puts him out of the protection of the Court is, the letter written by the under-sheriffs to the plaintiff's attorney, wherein they say—“We

(b) 6 Barn. & Cress. 739; S. C. 9 Dow. & Ryl. 723.

have recovered from a Mr. *Martin* a further sum upon a valuation made to him, which must be added to the Sheriff's return as soon as we can settle with the plaintiff, which we have not been able to do. If you are concerned for *Underhill*, you may, on making an appointment, inspect the accounts at our office, now in our possession. Mr. *Underhill*, however, who is related to the plaintiff, and for whose accommodation the farm was carried on, knows pretty well the amount of the expenses; he himself having received from the officer, and laid out, the greater part of the money." After this, can it be said that the Sheriff has not adopted the act of his officer? The maxim *respondeat superior* would have been said to apply, if the action had been brought against the bailiff.

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The rest of the Court concurring—

Rule discharged.

ALCOCK v. COOKE.

Wednesday,
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THIS was an action of trover brought to try the plaintiff's right to take wreck of vessels cast on shore in the parish of *Sutton-in-the-Marsh*, in the county of *Lincoln* (a). The venue was laid in *London*.

Mr. Serjeant *Adams*, on the first day of the present term, obtained a rule *nisi* to change the venue to *Lincolnshire*, upon affidavits stating that one *John Johnson*, the

The Court refused to change the venue, in an action of trover, from *London* to *Lincolnshire*, on the ground that all the defendant's witnesses resided in that county, and that one of them was very aged and could not safely be moved—the plaintiff's wit-

nesses all residing in *London*; but they directed that the evidence of that particular witness should be read from the Judge's notes of a former trial between the parties relative to the same subject-matter.

(a) *Vide ante*, Vol. 2, p. 625.

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most material witness for the defendant, who was upwards of eighty years of age, and resided about forty miles from *Lincoln*, and one hundred and fifty from *London*, could not safely be brought up to town to give evidence; and also that all the other witnesses resided in *Lincolnshire*.

Mr. Serjeant *Wilde* now shewed cause, upon an affidavit which stated that the plaintiff had five witnesses whom it would be necessary for him to take down from *London* in the event of the *venue* being changed. He submitted that it was not competent to the Court to change the *venue* in a transitory action, in which the plaintiff had a right to lay it where he pleased, merely to favour the defendant: and he offered to consent, on the part of the plaintiff, that the evidence given by *Johnson* on the former trial, should be read from the Judge's notes, or that he might be examined by two barristers upon the circuit.

Mr. Serjeant *Adams* stated, that nearly all the plaintiff's witnesses were clerks in public offices, who would be called for the mere formal proof of certain documents, as to which he offered to make admissions.

Lord Chief Justice TINDAL.—The general rule is, that, in transitory actions, the plaintiff may lay the *venue* where he pleases; and the Court will only interfere to change it where it is sworn that an impartial trial cannot be had in the county where it is originally laid, or where it appears that the expense of trying the cause there will greatly exceed that of trying it at the place to which it is proposed to move the *venue*. The present is a mixed case; there are witnesses on both sides whom it would be necessary, in the one case, to bring up to *London*, in the other to take down to *Lincoln*. We cannot try the balance of inconvenience. The general rule, therefore, must prevail. But, on the ground of the inability of the witness *Johnson* to

attend to give his evidence in *London*, the evidence given by him on the former trial between these parties, may be read from the Judge's notes.

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Rule discharged accordingly.

SHILLITO v. THEED.

Wednesday,
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ASSUMPSIT on a bill of exchange, by indorsee against acceptor. The plaintiff having been nonsuited in consequence of the non-attendance of two witnesses who had been subpoenaed by him for the purpose of proving the hand-writing of the acceptor—

The Court granted a new trial, on payment of costs, where the plaintiff had been nonsuited, in an action against the acceptor of a bill of exchange, by reason of the accidental absence of the witnesses subpoenaed by him to prove the hand-writing of the defendant.

Mr. Serjeant *Jones* obtained a rule *nisi* for a new trial, upon payment of costs.

Mr. Serjeant *Wilde*, *contra*, contended that, as there was no fault in the defendant, he was entitled to retain his judgment.

Lord Chief Justice TINDAL.—I think the plaintiff ought to have the benefit of a new trial, on payment of costs.

The rest of the Court concurring—

Rule absolute accordingly.

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In the case of bail by affidavit, where time had been allowed to answer affidavits impeaching their sufficiency, the Court refused to allow the defendant in the mean time to justify fresh bail.

LING'S Bail.

BAIL in this cause (a country cause) were attempted to be justified by affidavit on the 17th instant; but, they being opposed by affidavits alleging their insufficiency, the Court allowed the defendant a week to answer the plaintiff's affidavits, without prejudice to the proceedings. The defendant declined to avail himself of that leave, but put in fresh bail, which were now opposed by—

Mr. Serjeant *Andrews*, on behalf of the plaintiff, upon an affidavit setting forth the above facts.

Mr. Serjeant *Stephen*, on the part of the defendant, contended that he was not bound to avail himself of the leave given him by the Court on the former occasion, but might, on finding the first bail to be insufficient, put in other bail, in order to prevent an attachment against the Sheriff; and that the only consequence of rejecting the present bail would be to put the defendant to the unnecessary expense of moving to set aside the attachment, which he might do, upon an affidavit of merits, and putting in fresh bail.

Lord Chief Justice TINDAL.—I think this case is to be decided exactly on the same principle as if the bail had been in the box and examined in the first instance. Had they been there, they might have been questioned as to their sufficiency, and called upon to answer objections; and they would be accepted or rejected *instantly*. As an indulgence to the defendant in this case, a week was allowed for the bail to make answer to the affidavits produced on the part of the plaintiff to impeach their sufficiency. The moment that answer arrived, the bail would be taken *nunc pro tunc*. Finding, however, the affidavits too strong

to be answered, the defendant thinks proper to put in other bail. That is taking a step he is not entitled to take: and, whatever hardship it may entail upon the defendant, the practice of the Court must be adhered to.

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Mr. Justice PARK.—If we were to do what this defendant requires of us, it would put an end to the practice of granting any indulgence in the case of country bail.

Rejected (a).

(a) By the General Rules of Trinity Term, 1 & 2 Will. 4, (*vide post*, Vol. 5), it is ordered—"That the bail, of whom notices shall be given, shall not be changed without leave of the Court or a Judge."

CHARLES MITCHELL and MARGARET his Wife, and JOHN TARLETON and ISABELLA his Wife, v. Lady BITHIAH HUGHES.

Wednesday,
June 23rd.

THIS was a writ of entry. The count was as follows:—
"Charles Mitchell, Esq., and Margaret his wife, in right of the said Margaret, and John Tarleton, Esq., and Isabella his wife, in right of the said Isabella, by W. H. C. their attorney, demand against Lady Bithiah Hughes, widow, four stables, four other out-houses, and four acres of land, with the appurtenances, situate, lying, and being in the parish of *All Saints*, in the town and county of the town of *Southampton*, which they claim to be the right and inheritance of the said Margaret and Isabella, and into which the said Lady Bithiah hath not entry, but by one Mary Heywood who unjustly abated into the same after the death of one Thomas Collingwood, the uncle of the said Margaret and Isabella, and whose heiresses they are, within fifty years last past; and whereupon the said Charles, and Margaret his wife, and John, and Isabella his wife, say that the said Thomas was seised of the te-

The husband of one of two co-heiresses became bankrupt after an abatement:—*Held*, that his right to bring a writ of entry passed to his assignee by the bargain and sale under the commission.

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nements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the late King *George* the Third, late King of *Great Britain*, and within fifty years now last past, by taking the profits thereof to the value, &c.; and, being so seised, the said *Thomas*, to wit, on the 2nd day of *August*, 1780, at the parish aforesaid, died so seised; after whose death, the said *Mary* wrongfully abated into the same; and from the said *Thomas* the right descended to the said *Margaret* and *Isabella*, as cousins and heiresses of the said *Thomas*, to wit, as daughters and heiresses of one *Alexander Collingwood*, deceased, who was the brother and heir of the said *Thomas*; and into which &c.: and, therefore, the said *Charles* and *Margaret*, in right of the said *Margaret*, and the said *John* and *Isabella*, in right of the said *Isabella*, bring suit, &c.”

The tenant, in her *fifth* plea, alleged—That the said *John Tarleton*, before and on the 18th day of *April*, 1815, and from thence continually until the suing out the commission of bankrupt thereafter mentioned, was a merchant, dealer and chapman, and during all that time did use and exercise the trade of a merchant, by way of bargaining, &c., and sought his trade of living by buying and selling, to wit, at the town and county aforesaid; and the said *John Tarleton* so using and exercising the trade of a merchant, and seeking his trade of living as aforesaid, afterwards, to wit, on &c. last aforesaid, at &c. aforesaid, he the said *John Tarleton* became and was indebted to *E. B.*, *W. N.*, *I. H.*, *J. H.*, and *I. B.*, executrix and executors of the last will and testament of *Daniel Backhouse*, deceased, subjects of this realm, in the sum of 5,333*l.* 6*s.* 8*d.* of lawful money of *Great Britain*, for a true and just debt due and owing from the said *John Tarleton* to the said *E. B.*, *W. N.*, *I. H.*, *J. H.*, and *I. B.*, as executrix and executors as aforesaid; and the said

John Tarleton was then and there also indebted to divers other persons in divers other large sums of money; and the said *John Tarleton*, being so indebted as aforesaid, and being a subject of this realm, and so using and exercising the trade and business of a merchant, and seeking his trade of living as aforesaid, afterwards, to wit, on the day and year last aforesaid, at &c. aforesaid, the said debt to the said *E. B.*, *W. N.*, *I. H.*, *J. H.*, and *I. B.*, as executrix and executors as aforesaid, and the said other debts, being then and there due and unpaid and unsatisfied, became and was a bankrupt within the true intent and meaning of the several statutes then and still in force concerning bankrupts made and provided, some or one of them; and thereupon, afterwards, to wit, on the 22nd *June*, 1815, aforesaid, at &c. aforesaid, a certain commission of bankrupt under the Great Seal of the United Kingdom of *Great Britain* and *Ireland*, bearing date at *Westminster* the day and year last aforesaid, grounded upon the said several statutes, some or one of them, upon the petition of the said *E. B.*, *W. N.*, *I. H.*, *J. H.*, and *I. B.*, was duly awarded and issued against the said *John Tarleton*, directed to certain commissioners therein named, to wit, &c. &c.; by which said commission our lord the King did name, assign, and appoint, constitute and ordain them the said &c. &c. his special commissioners, thereby giving full power and authority to the said commissioners, four or three of them, to proceed according to the statutes in the said commission specified, and all other statutes in force concerning bankrupts, not only concerning the said bankrupt, his body, lands, tenements, freehold and customary, goods, debts, and other things whatsoever, but also concerning all other persons who, by concealment, claim, or otherwise, did or should offend touching the matters in the said commission specified, or any part thereof, contrary to the true intent and meaning of the same statutes; and our said lord the King did thereby command

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the said &c. &c. to do and execute all and every thing and things whatsoever, as well for and towards satisfaction and payment of the said creditors of the said *John Tarleton*, the bankrupt aforesaid, as towards and for all other intents and purposes, according to the ordinances and provisions of the same statutes; and our said lord the King by the said commission commanded the said &c. &c., or any four or three of them, to proceed to the execution and accomplishment of the said commission, according to the true intent and meaning of the statutes, with all diligence and effect: as in and by the said commission, relation being thereunto had, will more fully appear: By virtue of which said commission, and by force of the several statutes concerning bankrupts, the said &c. &c., the major part of the said commissioners named in the said commission (having severally and respectively duly taken the oath prescribed and appointed to be taken by commissioners of bankrupts, according to the form of the statutes in that case made and provided, and having then and there entered and kept a memorandum thereof among the proceedings in the said commission), afterwards, to wit, on &c., at &c, aforesaid, did in due form of law find that the said *John Tarleton* had become a bankrupt within the true intent and meaning of the statutes made and then in force concerning bankrupts, before the date and issuing forth of the said commission, and did then and there declare and adjudge him to be a bankrupt accordingly: And the said Lady *Bithiah* further said, that, afterwards, and before the commencement of this suit, to wit, on &c., the said *John Tarleton* remaining and continuing a bankrupt, the said &c. &c., four of the said commissioners named in the said commission, by a certain indenture of bargain and sale then and there made between the said &c. &c., the major part of the commissioners named and authorized in and by the said commission of bankrupt so as aforesaid awarded and issued against

the said *John Tarleton*, of the one part; and *J. B.* of &c., *I. H.* of &c., and *W. N.* of &c., of the other part, then and there being creditors of the said *John Tarleton*; sealed with the seals of the said &c. &c., bargained and sold to the said *J. B.*, *I. H.* and *W. N.*, their heirs and assigns, all the freehold and copyhold messuages, lands, tenements, and hereditaments whatsoever and wheresoever, situate, lying, and being in the respective counties of *Middlesex*, *Lancaster*, and *Northumberland*, and elsewhere in the United Kingdom of *Great Britain* and *Ireland*; and also the freehold and other messuages, lands, tenements, plantations, estates, and hereditaments, and the negroes and other slaves, servants, cattle, stores, stocks, implements, and other appurtenances, situate, lying, and being in the islands of *Granada*, *Dominica*, *St. Vincent*, *St. Lucia*, *Trinidad*, or in any other islands, parts, or places in the *West Indies*, or in the colonies of *Demerara*, *Surinam*, *Issequibo*, or any other the colonies or territories belonging to the said kingdom; and all other the real estate, lands, tenements, or hereditaments whatsoever, and wheresoever situate and being, whereof or wherein or whereunto respectively he the said *John Tarleton*, whether in his own right or as surviving partner of the said *Daniel Backhouse*, deceased, or otherwise, at the time he the said *John Tarleton* became bankrupt, or at any time since, had any estate, right, title, or interest, in possession, reversion, remainder, or expectancy, or otherwise howsoever, with their and every of their appurtenances, and all the estate, right, title, interest, use, trust, property, benefit, power, equity of redemption, claim and demand whatsoever, both at law and in equity, of him the said *John Tarleton*, or of them the said commissioners by virtue of the said commission, of, in, and to the same premises, every or any part thereof, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and of every or any part or

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parcel thereof; together with all deeds, evidences, and writings touching and concerning the same—To hold the same unto the said *J. B.*, *I. H.*, and *W. N.*, their heirs and assigns, to the use of them the said *J. B.*, *I. H.*, and *W. N.*, their heirs and assigns for ever, upon trust, nevertheless, to and for the several uses of them the said *J. B.*, *I. H.*, and *W. N.*, and all other the creditors of the said *John Tarleton* who then had sought, or who afterwards should in due time come in and seek relief by virtue of the said commission: And the said Lady *Bithiah* further said, that the said bargain and sale was duly enrolled in his Majesty's High Court of *Chancery* in *England*, and that, by force of the said bargain and sale, and of the statute in that case made and provided, the said *J. B.*, *I. H.*, and *W. N.*, became and were entitled to all the right and interest of the said *John Tarleton* of and in the said tenements with the appurtenances in the said declaration mentioned, he the said *John Tarleton*, previously to the said bankruptcy having had by the said *Isabella* issue capable of inheriting the said tenements with the appurtenances: And this &c., wherefore &c., if the said *Charles* and *Margaret* his wife, and *John Tarleton* and *Isabella* his wife, ought further to have or maintain their aforesaid action thereof against her &c.

To this plea the demandants demurred generally, concluding with the prayer of judgment—"if they, the said *Charles* and *Margaret* his wife, and *John Tarleton* and *Isabella* his wife, ought to be barred or precluded from having or maintaining their aforesaid action thereof against the said Lady *Bithiah*, &c." The tenant joined in demurrer.

The question to be raised by the demurrer was, whether the bankruptcy of the demandant, *John Tarleton*, he having at that time issue capable of inheriting, destroyed the right of entry of the demandants.

Mr. Serjeant *Jones*, for the demandants.—The contention on the part of the tenant will be, that the right to bring the writ of entry passed by the assignment under the commission, so that the assignees ought to be the demandants. But will it be contended that the assignees *alone* should have been demandants with *Mitchell* and wife, or that they should have joined with *Tarleton's* wife? To establish her case, the tenant must shew that there was in *Tarleton* an estate that might and did pass to the assignees by the bargain and sale, in respect of which the assignees could bring a writ of entry. The record admits that the writ would be maintainable but for the bankruptcy. The bankrupt laws could not pass more than *Tarleton* had; but *Tarleton* might have an interest which the bankrupt laws did not pass. *Tarleton*, however, had no seisin at all in his own right: he had married a woman who had a right to bring a writ of entry; but even she was not seised; the abatement of *Mary Heywood* had displaced the immediate succession. Suppose there had been no abatement or bankruptcy, the seisin being in *Tarleton* and his wife, in right of the wife, his was a mere derivative, or what is called in the old books a vicarious, right. *Tarleton* never could himself have brought a writ of entry. Neither could he be tenant by the curtesy; to admit of that, there must have been a seisin *in deed* in the wife: a seisin *in law* is not sufficient. Lord *Coke* says (a): “There is in law a two-fold seisin, *viz.* a seisin in deed, and a seisin in law. As, if a man dieth seised of lands in fee-simple or fee-tail general, and these lands descend to his daughter, and she taketh a husband and hath issue, and dieth before any entry, the husband shall not be tenant by the curtesie; and yet in this case she had a seisin in law: but, if she or her husband had during her life entered, he should have been tenant by the curtesie. A man

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(a) Co. Litt. 29. a.

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seised of an advowson or rent in fee hath a daughter, who is married and hath issue, and dieth seised; the wife, before the rent became due or the church became void, dieth; she had but a seisin in law, and yet he shall be tenant by the curtesie, because he could by no industry attain to any other seisin: *et impotentia excusat legem*. But a man shall not be tenant by the curtesie of a bare right, title, use, or of a reversion or remainder expectant upon any estate of freehold, unless the particular estate be determined or ended during the coverture." It is enough for the present argument, to say that the husband was not tenant by the curtesy; nor could he be until the determination of this action. He is only introduced into the action for the sake of conformity. He has no more interest in the land than a plaintiff has in the fruits of a penal action. It may be true that the rents may go to the husband in case the demandants succeed in this action, because the rents would then become fruits fallen. The right to the rents when received is, however, perfectly distinct from the right to bring a writ of entry. Suppose the husband to be attainted of felony, the King could not take the freehold, but only a pernaney of the profits during the coverture; the freehold would remain in the wife (a). If the wife be attainted of felony, the lord may enter and put out the husband; for, the estate is only by privity. Dame *Hale's* case (b). So, the right to recover the land of the wife consists only in privity, and cannot be forfeited or assigned in law. Marquis of *Winchester's* case (c). In the case of *Smith v. Coffin* (d), where it was held that the right of bringing a writ of entry passed to the assignees of a bankrupt by the assignment of the commissioners, the very ground of the decision was, that the bankrupt was seised in his own right, and that every thing that belongs to the

(a) Co. Litt. 351. a.

(b) Plowd. Com. 260 b.

(c) 3 Rep. 2 b.

(d) 2 H. Blac. 444.

bankrupt passes to his assignees. In this writ, the demandants claim the right and inheritance; they must recover the inheritance, or nothing. What claim has the bankrupt to the inheritance? Any profits which he may afterwards receive, the assignees may take: but that is not the question here. What has the husband here, that he could, in the language of the old statutes, lawfully depart withal? *Jacobson v. Williams* (a), and *Gayer v. Wilkinson* (b), are authorities to shew that a *possibility* will pass by the assignment; but it must be a possibility that is capable of being released or assigned. Here is nothing that could be released or assigned.

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Mr. Serjeant *Merewether, contra.*—The question is as to the husband's right in respect of the coverture. The husband and wife are seised in right of the wife. It is a right in respect of which the husband and wife may maintain a writ of entry; and it is clear that the right to bring the writ of entry passed by the assignment to the assignees: the question is entirely put an end to by the case of *Smith v. Coffin*, where such a right was held to pass under the general words in the bargain and sale. *Higden v. Williamson* (c), and *Jewson v. Moulson* (d), are also authorities to shew that a contingent interest or possibility in a bankrupt is assignable. With respect to the case of attainer of the wife, there the freehold is put an end to.

Mr. Serjeant *Jones, in reply.*—In *Smith v. Coffin*, the interest was that of the bankrupt in his own right; and in *Higden v. Williamson* the decree was confirmed by the Lord Chancellor on the express ground that the interest in question was one that the bankrupt himself might have departed with.

Cur. adv. vult.

(a) 1 P. Wms. 382.

(b) 1 Bro. Chan. Cas. 50.

(c) 3 P. Wms. 132.

(d) 2 Atk. 417.

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Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The point raised for the consideration of the Court by the defendant's plea is this—whether the bankruptcy of *John Tarleton*, the husband of *Isabella*, one of the co-heiresses named in the writ, which bankruptcy took place after the abatement made upon the two co-heiresses, gives any right to bring a writ of entry to his assignees; for, if the right to bring a writ of entry for any immediate estate of freehold is vested in the assignees, it follows that the demandants cannot recover in the present action.

If the writ of entry *sur abatement* in the present case had been brought to recover land to which the bankrupt made title to himself by descent, in his own right, there could be no doubt, after the decision of the case of *Smith v. Coffin (a)*, but that the right to bring such writ would have passed to the assignees under the usual bargain and sale from the commissioners; for, as that case has established that such right of entry was a hereditament within the meaning of the bankrupt act, and that it passed to the assignees under the general words inserted in the bargain and sale, we think the same construction must be put on the present bankrupt act, notwithstanding the omission of some words in the 64th section which are to be found in the previous acts; for, we think that neither the extent nor the nature of the bankrupt's property intended to be vested in the assignees for the benefit of the creditors, is thereby in any way limited or confined. But it is contended by the demandants, that the title to the land in the present writ, not being made in right of the bankrupt, but in right of the wife, the husband is joined therein for conformity only, and that, in consequence, no right to bring the action can pass to the assignees.

This depends upon the question, what rights in the wife's estate pass to the assignees of the husband under

(a) 2 H. Blac. 444.

the commission. If the husband had been actually seised of this land in right of his wife, the assignees would have taken under the bargain and sale an immediate estate of freehold during the coverture (a). It is unnecessary, therefore, to consider any claim of the husband as tenant by the curtesy; it is sufficient for the present purpose to observe that, if the wife's seisin had been a seisin in fact, the husband would have become seised of the freehold in her right during the coverture. If, then, such would have been the husband's right, such also would have been the right of the assignees under the bargain and sale; and, if the assignees are to bring the writ of entry where the abatement has been made upon the bankrupt, in order to recover the fee which he then claims to be his right and inheritance, there seems every reason, by analogy, that, where the abatement is made upon the wife, the right to bring the writ for the freehold which the husband would become entitled to should also pass to the assignees. Debts due to the wife *dum sola*, and other *choses in action* belonging to the wife before marriage, pass to the assignees under the commissioners' assignment, and are recoverable by them in their own name, *Miles v. Williams* (b); and the reason given by Lord Chief Justice *Parker*, in delivering the opinion of the Court in that case, is, that, it was the intention of the bankrupt law, "that the bankrupt should not be trusted any more with the arrangement of his estate, but that it should be put into other hands, for the safety of the creditors, and that the bankrupt should have no further intermeddling therewith."

It is argued that the demandants claim in this writ the fee and inheritance, and that it is impossible to contend that the assignees could ever claim the inheritance, which belongs to the wife, and in no respect to the husband. It may be admitted that this is the case; and, if the inherit-

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(a) Com. Dig. tit. "Coverture," (D. 11.) (b) 1 P. Wms. 248.

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ance were necessarily claimed, and no writ of entry could be framed to recover a freehold only, the inference could be only this, that no right of action could vest in the assignees in respect of the abatement on the wife. But it is clear that the demandant in a writ of entry may claim the freehold only—(see *Dyer*, 101 a, where the count in a writ of entry, having stated the demandant to have been seised as of fee, was amended by a statement that he was seised “*ut de libero tenemento*:”)—and in *Fitzherbert’s Natura Brevium* (a) it is laid down, that, if tenant for life or tenant in tail be disseised, they may sue a writ of disseisin, but in that writ it shall not be said *quod clamat esse jus suum et hæreditatem suam*, and in his count he shall set forth his especial esplees, &c. (b). So that the argument that the assignees could not sue, because they could not maintain this writ, fails, when it is shewn that they might maintain another, better adapted to the estate which they would claim.

Upon the general ground, therefore, that, in all instances in which the assignees take any interest derivatively from the bankrupt, for the benefit of the creditors, they are empowered by the bankrupt act to sue in their own name, we think the present count, in which the bankrupt sues to recover in his own name and that of his wife, land in which he would take a freehold that would forthwith belong to the assignees, cannot be supported. Cases may occur in which, from absolute necessity, the husband must be joined in order to recover the rights of the wife; upon these we give no opinion.

Judgment for the defendant.

(a) Page 443, A.

(b) See also Rast. Ent. 272; Co. Ent. 219.

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Friday,
June 25th.

FOSTER and Others v. WESTON.

THIS was an action of debt upon an instrument under seal, in the following form:—

“ *Sierra Leone, 17th May, 1828.*

“ We, *Kenneth M'Aulay, Henry Weston, and John Hamilton*, do hereby bind ourselves jointly and severally to *Messrs. Foster & Smith*, of *London*, for the due and sufficient payment of the sum of 1,500*l.* sterling; which amount is to be handed over and delivered to *Robert Dargon* in goods for sale on their account at the invoice prices, with expenses, that is to say, that the goods shall amount to 1,300*l.* sterling, calculating that the expenses will amount to 200*l.*, making together 1,500*l.*, as before stated.

“ Now the condition of this obligation is such, that the said sum of 1,500*l.* is to be duly paid and remitted to *Foster & Smith* in three equal payments of 500*l.*, at three, five, and seven months from this date; And we, *Kenneth M'Aulay, Henry Weston, and John Hamilton*, hereby bind ourselves for the due payment of the same at those periods. In failure of which we acknowledge and hereby render ourselves liable to be sued and proceeded against for the amount. Witness our hands, &c. &c.”

It having been referred to the Prothonotary to ascertain what principal was due upon the above instrument, and whether *interest* was payable thereon—he allowed interest.

Mr. Serjeant *Wilde* thereupon, on a former day in this term, obtained a rule *nisi*, to stay the proceedings on payment of 617*l.* 15*s.*, the amount of principal found to be due on the bond, contending that the defendant was not liable for interest.—He referred to *Higgins v. Sar-*

Interest is only allowed by law upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade (as in the case of bills of exchange, &c.) or other circumstances.

A., B., & C., by an instrument under seal, engaged to pay to the plaintiffs 1,500*l.*, in goods, in equal payments, at three, five, and seven months; in failure of which they thereby rendered themselves liable “to be sued and proceeded against for the amount.”—

Held, that this contract did not entitle the plaintiffs to interest upon the amount from the respective days of payment.

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gent (a), where interest was held not to be recoverable in an action of covenant upon a policy of insurance on the life of A., by which a certain sum was made payable six months after due proof of his death; although the money insured was not paid at the time stipulated for that purpose.

Mr. Serjeant *Spankie* now shewed cause.—This instrument is under seal. In *Farquhar v. Morris* (b), interest was allowed upon a bond, though not expressly reserved. In *De Havilland v. Bowerbank* (c), Lord *Ellenborough* expresses a wish to lay down some general rule upon the subject of interest, and says: “It appears to me that interest ought to be allowed only in cases where there is a contract for the payment of money *on a certain day*, as on bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been used, and interest has been actually made.” The present case evidently falls within that rule: the payments were to be made on days certain; and the instrument was in effect the same as a bill of exchange or promissory note, having only the addition of a seal. The rule laid down by Lord *Ellenborough* has never been impugned. In *Hogan v. Page* (d), the action was upon a single bill, and there was no time fixed for payment of the money. So, in *Page v. Newman* (e), the payment was to be made, not upon a day certain, but upon a contingency; which takes that case also out of the rule. In *Higgins v. Sargent*, too, the day of payment was uncertain. In *Page v. Newman*, the Court of *King’s Bench* seemed to think the doctrine of Lord Chief Justice *Best*, in the case of *Arnott v. Redfern* (f), to be rather too liberal. The decision, how-

(a) 2 Barn. & Cress. 348.

(b) 7 Term. Rep. 124.

(c) 1 Camp. 50.

(d) 1 Bos. & Pul. 337.

(e) 9 Barn. & Cress. 378; S. C. 4 Mann. & Ry. 305.

(f) 11 J. B. Moore, 209; S. C. 3 Bing. 353.

ever, in that case, was in accordance with the law of *Scotland*, which is perhaps more consonant with justice than our own upon this subject.

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Mr. Serjeant *Wilde*, in support of his rule.—This instrument has no penalty attached to it; there is nothing, therefore, out of which, in equity, a larger remedy could be dealt out than the clear amount of the principal sum stipulated for; neither is it a commercial instrument; nor one upon which interest could be demanded according to any usage. The only stipulation it contains with reference to the breach is this:—"In failure of which (that is, in failure of payment at the periods agreed upon), we (the obligors) hereby render ourselves liable to be sued and proceeded against *for the amount*." Now, if interest had been in the contemplation of the parties, nothing was more easy than to insert words to that effect. In *Farquhar v. Morris*, the bond contained a penalty, from which the defendant was only entitled to be relieved on payment of the actual damage sustained by the obligee in consequence of the obligor's failure in the due performance of the condition. *Mountford v. Willis* (a), and *Slack v. Lowell* (b), merely decided, that, where goods are sold, to be paid for by a bill at a certain date, and the Jury take upon themselves to give interest by way of damages, the Court will not on that account set aside the verdict. The rule laid down by Lord *Ellenborough* in *De Havilland v. Bowerbank*, was not intended to apply to *all* instruments upon which the payment was to be made on a day certain: but, in *Gordon v. Swan* (c), his Lordship limited it to bills of exchange and such like instruments, and to agreements expressly reserving interest. And in *Higgins v. Sargent*, Lord Chief Justice *Abbott* said (d): "It is now established as a general principle, that

(a) 2 Bos. & Pul. 337.

429.

(b) 3 Taunt. 157.

(d) 2 Barn. & Cress. 349.

(c) 12 East, 419; S. C. 2 Camp.

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interest is allowed by law only upon *mercantile securities*, or in those cases where there has been an *express promise to pay interest*, or *where such promise is to be implied from the usage of trade* or other circumstances. It is of importance that this rule should be adhered to: and, if we were to hold that interest was payable in this case, the application of the rule might be brought into discussion in many others." Mr. Justice *Bayley* said: "It was once the opinion, that money lent carried interest, and in *Calton v. Bragg* (a) it was so contended, on the ground that the lender would otherwise, for the accommodation of the borrower, lose the benefit which he might make of his capital; and that the lender ought, in equity, to be put in the same situation as if he had applied his principal to his own use. But this Court held that interest was not due by law for money lent, without a contract for it expressed or to be implied from the usage of trade, or from special circumstances. Now, if interest be not due for money lent, which is to be repaid either upon demand or at a given time, it follows that it is not due for money payable within a certain time, after due proof of the happening of a particular event." And Mr. Justice *Holroyd*: "It is clearly established by the later authorities, that, unless interest be payable by the consent of the parties, express, or implied from the usage of trade (as in the case of bills of exchange), or other circumstances, it is not due by common law. Even in *De Havilland v. Bowerbank*, Lord *Ellenborough* was of opinion, that, where money of the plaintiff had come to the hands of the defendant, to establish a right of interest upon it, there should be either a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money having been used: and in *Gordon v. Swan*, although the money was payable at a particular day, non-payment

(a) 15 East, 223.

at that day was held not to give any right to interest. Independently of these authorities, I am of opinion, upon the principles of the common law, *that interest is not payable upon a sum certain payable on a given day.*" In *Arnott v. Redfern*, a Court of competent jurisdiction in Scotland having given interest, this Court refused to disallow it. That was all that was necessary to the determination of that case; the expressions contained in the judgment which were objected to by Lord *Tenterden* in *Page v. Newman*, were extra-judicial. In the last-mentioned case, Lord *Tenterden* said (a): "It is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest." In that case, the Court approved the doctrine laid down in *Higgins v. Sargent*. Here, there is not only an entire absence of any stipulation with respect to interest, but, on the contrary, the language of the instrument is such as to repel the presumption that interest was intended to be payable; and there is no penalty from which the party seeks to be relieved, neither is the instrument of a mercantile character: there is therefore no ground upon which the plaintiff is entitled to interest.

Lord Chief Justice TINDAL.—There can be little doubt but that the party who framed this instrument intended it to operate as a bond. To constitute a bond, however, there must be a penalty. But here the obligors have only bound themselves to the payment of a precise sum—"In failure of which, we acknowledge and hereby render ourselves liable to be sued and proceeded against *for the amount.*" The consequence, therefore, is, that this, instead of being a bond, is what the law calls *simplex obligatio*. There is no virtue in the *seal* of a bond, to make it bear interest, when otherwise the instrument would not carry it. The only question is, whether interest is charge-

(a) 9 Barn. & Cress. 380.

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able upon a sum made payable on a certain day. *Higgins v. Sargent* must govern this case. There are many other cases of money payable at a day certain, where interest is never allowed; for instance, in the case of rent, which is payable on certain days, it was never imagined that in covenant for non-payment interest could be recovered. It seems to me that we should be breaking in upon a general and intelligible rule, if we held interest to be payable in this case. The instrument does not in express terms provide for interest; neither is it a mercantile instrument; nor is there any usage that would warrant the allowance of interest. I therefore think that this rule ought to be made absolute.

Mr. Justice PARK.—I am not prepared to say that the liberality of the *Scotch* law, which allows interest to be given for the detention of a debt beyond the proper time of payment, is not wiser than our own; but we can only look to the law of *England*. There have been much diversity of practice and many conflicting decisions upon the subject. Two reasons have been urged in argument, on the part of the plaintiffs, to shew that interest ought to be allowed in this case—*first*, because the money was stipulated to be paid on a day certain—*secondly*, on the assumption that this is a mercantile contract. Upon the latter point I differ. This is not a mercantile contract; it bears none of the usual features of such contracts. With respect to the first point, I think the cases alluded to by my Lord Chief Justice are decisive. In *Higgins v. Sargent*, in covenant upon a policy of insurance upon the life of *A.*, payable six months after due proof of his death, due proof was given, and the six months had elapsed, and the Court held that the plaintiff was not entitled to recover interest upon the sum insured, from the expiration of that period. In *Page v. Newman*, too, the rule is very neatly and accurately laid down by Lord *Tenterden*. I concur with the

Lord Chief Justice in thinking that this rule ought to be made absolute.

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Mr. Justice GASELEE.—There is no subject upon which, in earlier periods, there has been more fluctuation in the decisions than upon this. Of late, however, the rule has been very clearly and accurately defined.

Mr. Justice BOSANQUET.—I am of the same opinion. It is very desirable that exceptions to the rule now established for the allowance of interest should not be too frequent. Upon the face of the contract in question, there is no stipulation for the payment of interest; neither is it a mercantile contract, although, perhaps, it may relate to a mercantile transaction: nor is there any usage to warrant the allowance of interest.

Rule absolute.

WARD and Another v. SMITH.

Friday,
June 25th.

THIS was an action for a libel contained in the following letter, written by the defendant, and sent by him to Messrs. *Weston & Clouston*, merchants, at *Sierra Leone*:—

“ *London, 17th September, 1828.*

“ Dear Sirs,—The annexed is a copy of our last; since when we have received yours of the 21st *June*, covering bill of lading for two hundred and seventy-two logs of tim-

The plaintiffs having obtained a contract for the supply of a quantity of *African* timber to the Navy Board, agreed to divide it with the defendant's house, the latter undertaking to supply the plaintiffs with their moiety of

the timber at a certain price, and to take their bills for the amount. This agreement was subsequently abandoned by the defendant, on some difficulty arising as to the measurement of the timber; and the defendant wrote to Messrs. *W. & C.*, of *Sierra Leone* (who were correspondents and debtors to his firm), a letter strongly reflecting upon the character of the plaintiffs, stating them to be “notorious for everything but fair dealing and a strict adherence to their engagements.” In an action of libel, it was left to the Jury to say, whether the letter was written fairly and honestly, or with a malicious intention to injure the plaintiffs. The Jury having found for the defendants—the Court directed a new trial:—*Held* also, that the transmission of the letter by the defendant to Messrs. *W. & C.* was sufficient evidence of publication by him.

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ber, *per Deveron*, with bill on Mr. *Laing*, 526*l.*; he has accepted it for 350*l.*, two-thirds the amount of the timber; and the remainder is to be paid in cash, on the delivery of the cargo, as *per contract*, of which, we believe, you were furnished with a copy. The Navy Board have come to the determination, which they state to be unalterable, that the timber shall be measured strictly in conformity to the drawings and models referred to in the contract, and thereby making it, as we have before explained to you, perfectly square timber. We, of course, have nothing to do with it on those terms. The contractors, however, are determined to go on, and for that purpose have appointed Mr. *Barber* their agent, to purchase the timber necessary to fulfil it, authorizing him, we presume, by powers of attorney or otherwise, to draw bills on them for the cargoes as they are shipped. We confess ourselves at a loss what advice to give you under these circumstances; for, the contractors are notorious for every thing but fair dealing and a strict adherence to their engagements; and, should any dispute or difficulty arise between them and the Board, as to the description and measurement of the timber, they would with little ceremony turn round and set Mr. *Barber* and his bills at defiance. However, the better plan probably will be to act with Mr. *Macauley* and Mr. *M'Cormick*, and on no account to make an engagement to extend beyond the present season. Let the timber be described in the same way as in the contracts we have heretofore made for you, and subject to the customs' measure, obtaining Mr. *Barber's* approbation as to quality and dimensions, although that would, we suspect, have little weight with them. Two pounds seventeen shillings and six-pence, or three pounds *per load*, should, we think, be the price for timber of twenty-three feet and upwards, and fourteen inches square. Probably the most favourable time to negotiate the sale would be when he is surrounded by ships. To keep our market supplied, we shall send out the *Wood-*

bridge (five hundred and twenty tons), to leave this in *November*, for a cargo of timber twenty feet length and upwards: you will therefore prepare for her. The contract, up to this moment, has not had the slightest effect on the price. We, however, suspect that things cannot remain long in their present state.

“ We remain, Gentlemen, &c. &c.

Forster & Smith.”

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after last *Hilary* Term, when the following facts appeared in evidence:—

Messrs. *Forster & Smith*, together with two other mercantile houses, had sent in a tender to the Navy Board for a supply of *African* teak. The plaintiffs, however, who had sent in a tender at a lower price, obtained the contract. It was afterwards agreed between the plaintiffs and Messrs. *Forster & Smith*, that the contract should be divided between them, the latter undertaking to supply the plaintiffs with half the timber, to be delivered at *Sier-ra Leone*, at 2*l.* 17*s.* 6*d.* *per* load, subject to the dock-yard receipt and measurement, and according to the terms of the contract; and for which they agreed to take the plaintiffs' bills. This agreement was entered into on the assumption that the timber would be received by the Navy Board in the usual manner, that is, not strictly as stated in the contract. But it afterwards appearing that they had come to the determination mentioned in the letter above set forth, of requiring the timber to conform exactly to the drawings and models, thus rendering the contract less beneficial to the parties, Messrs. *Forster & Smith* declined to participate in it. The letter containing the alleged libel was afterwards written by the defendant; the firm to which it was addressed being that through which the moiety of the timber was to have been furnished to the plaintiffs under the agreement entered into with *Forster & Smith*.

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On the part of the defendant, it was contended, that the letter in question was in the nature of a privileged communication, it having been addressed by the defendant to a house with which he was in the habit of corresponding, and in whose well-being he was (as a creditor) interested; and also that there was no proof of publication by the defendant, the mere fact of his having sent it to Messrs. *Weston & Clouston*, not being sufficient.

His Lordship, however, held the transmission of the letter by the defendant to Messrs. *Weston & Clouston*, to be sufficient evidence of a publication by him; and he left it to the Jury to say, whether the letter was written fairly and honestly, or with a malicious intention to injure the plaintiffs.

The Jury having found for the defendant—

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi that this verdict might be set aside, and a new trial had, on the ground of the verdict being against evidence. He admitted that the communication, if made fairly and honestly, would have been privileged; but contended that its falsehood and malice were manifest from the defendant's own conduct—he having in the first instance agreed to take the plaintiff's own bills, which shewed that his real opinion as to their character was not such as, for purposes of his own, he chose to represent to his correspondents; and that such a line of conduct on his part could only have been occasioned by a feeling of annoyance at the loss of the contract.

Mr. Serjeant *Taddy* now shewed cause.—The nature of commercial communications renders it necessary that they should be privileged. In the case of *M'Dougall v. Claridge* (a), a letter addressed by the defendant to third persons, charging the plaintiff, a solicitor, with improper

(a) 1 Camp. 267.

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conduct in the management of their concerns, was held not to be libellous, it appearing that the defendant was himself interested in the affairs which he had supposed to have been mis-managed by the plaintiff. Lord *Ellenborough* there said: "If a communication of this sort, which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted." In *Dunman v. Bigg* (a), the plaintiff, a dealer in beer, buying it of brewers, and selling it to publicans, being about to open an account with the defendant, a brewer, one *L.* became his surety for the price of such beer as should from time to time be supplied to him, the defendant promising to inform the surety of any default in his payments made by the plaintiff. After the parties had dealt together for some time, the defendant went to the surety and said, that the plaintiff wished to cheat him, that he had sent back as unmerchantable, beer which he himself had adulterated, and that he was a *rogue* and a *rascal*. There was no evidence that any cause existed to justify such language, it merely appearing that a debt was due from the plaintiff to the defendant for beer: but, inasmuch as the surety, to whom the communication was made, was connected with the transaction, Lord *Ellenborough* was inclined to think it privileged—saying, that, "even if the representations which he (the defendant) made were intemperate and unfounded, still, if he really believed them at the time to be true, he could not be said to have acted maliciously." In the present case, it is admitted that the communication was in itself confidential and privileged; but it is contended that there was evidence of malice sufficiently strong to prevent the application of the rule as to privileged communications. The case of *Dunman v. Bigg* shews that the mere circumstance of a party using strong and improper language, or going beyond that which facts

(a) 1 Camp. 269, n.

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will warrant, does not destroy the privilege. Here, the communication was *bond fide*, though perhaps it contains a mistaken expression of opinion respecting the probable conduct of the plaintiffs in a supposed event. *M' Dougall v. Claridge* also shews that the party's being interested in the subject-matter of the communication, will protect him from an action. Here, the defendant was interested, Messrs. *Weston & Clouston* being correspondents and debtors to the firm of which he was a member. It is clear also that the letter was not intended to injure the plaintiffs here; it was merely written as a guide to Messrs. *Weston & Clouston* in negotiating with the plaintiffs' agent the sale of the timber. The question of malice has already been sufficiently and properly submitted to the Jury, and they have by their verdict negatived that the communication was other than *bond fide*.

Mr. Serjeant *Wilde*, in support of the rule, was stopped by the Court.

Lord Chief Justice TINDAL.—Without expressing any opinion that might prejudice the cause on the rehearing, we think that, on payment of costs, the matter ought to be submitted to another Jury.

Rule absolute accordingly.

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IN THE EXCHEQUER CHAMBER.

EASTERBY *v.* SAMPSON and Another.

[In Error (a).]

Friday,
June 18th.

THIS was an action of covenant. The declaration stated that Sir *Charles Turner*, Bart., before and at the time of making the indenture of demise thereafter mentioned, was seised in his demesne as of fee of and in one undivided third part of and in the tenements, with the appurtenances, situate, &c., thereafter mentioned to have been demised, to wit, at &c.: and the said Sir *Charles* being so seised thereof, theretofore, to wit, on &c., at &c., by a certain indenture of lease then and there made between Sir *Charles* of the one part, and *Aubone Surtees*, *John Surtees*, *George Doubleday*, the defendant, *Walter Hall*, and *Frederick Hall*, of the other part—reciting that the said Sir *Charles* did, in the month of *December*, 1799, agree with the said *A. Surtees*, *J. Surtees*, *G. Doubleday*, the defendant, *W. Hall* and *F. Hall*, to demise to them for the term of twenty-one years from the 1st *January* then next following, the undivided third part of Sir *Charles*

A., by indenture of lease—reciting that the lessees had, by and with the permission of the lessor, and of *W. S.* and *C. F. F.* (the owners of the other two third parts of the demised premises), taken down a smelting-mill belonging to them, situate upon part of the waste of certain manors, and that the lessees did engage to erect, at their own expense, a smelting-mill of larger dimensions upon another part of the waste, which mill, &c., it had

been agreed should be the property of the lessor, *W. S.*, and *C. F. F.*, in lieu of the said mill, &c., so taken down—demised to the defendant and five others an undivided third part of and in all and singular the mines, &c., then opened or discovered, or which during the continuance of the demise might be discovered under the said waste; and also all smelting-mills, &c., situate upon the said waste: with liberty to the lessees to sink shafts, and also to erect or build upon any part of the waste all such smelting-mills and other buildings as might be requisite or necessary for working the mines, and washing, dressing, &c., the ore and minerals raised therefrom: and the defendant covenanted with the lessor, his heirs and assigns, that the lessees should keep the smelting-mill engaged to be erected by them, and all other the buildings already erected, and which should during the continuance of the demise be erected near to the said mill, and all watercourses, &c., in good and sufficient repair, and yield up the same in good repair at the expiration of the term:—*Held—First*, that, upon this deed, an implied covenant arose on the part of the defendant to erect the smelting-mill, so as to enable *A.*, the lessor, to sue for a breach thereof—*Secondly*, that such covenant ran with the land, inasmuch as it affected the mode of enjoying the demised premises; and therefore that an action of covenant might be maintained for the breach by an assignee of the reversion.

(a) Roll 3297.

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of and in the mines, minerals, and quarries thereafter described, at and under the yearly rent of 1,400*l.*, and under and subject to the covenants and agreements thereafter contained; that the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, did, in pursuance of the said agreements between them and the said Sir *Charles*, enter upon and take possession of the said third part and premises on or about the 1st *January*, 1800; that the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, had since the 1st *January*, 1800, by and with the permission of Sir *Charles* and of *William Sleigh, Esq.*, and *Charles Francis Foster, Esq.*, the owners of the other two third parts of the said mines and premises, taken down a smelting-mill belonging to them, situate upon part of a tract of waste ground within the manor of *Arkindale* thereafter mentioned, called *Old Moulds*, and some other contiguous buildings; and that the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, did engage to erect, at their own expense, a smelting-mill of larger dimensions, with several adjoining buildings, upon another part of the said tract of waste ground, which mill, with the water-wheel belonging thereto, and the said other buildings, it had been agreed should belong to and be the property of the said Sir *Charles, W. Sleigh*, and *C. F. Foster*, in lieu of the said mill and buildings so taken down—in consideration of the rent thereby reserved, and of the covenants and agreements thereafter contained, did demise to the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, their executors, &c., all that the undivided third part or share of the said Sir *Charles* of and in all and singular the mines, veins, pipes, floats, strings, and parcels of lead, tin, and copper ore, and other minerals and fossils of what nature or kind soever, which were then known, found, or discovered, or which could, should, or might, during the continuance of that demise, be opened, known, found, discovered, or gotten, in, within, upon, from,

or under all the moors, commons, wastes, and inclosed lands situate, lying, or being in or within or parcel of the several manors or lordships, or reputed manors or lordships of *Arkindale*, *New-Forest*, and *Hope*, in the county of *York*, or any of them, or any part thereof respectively; and also of and in all mines and seams of coal, and quarries of stone, then found, discovered, or opened, or which during the continuance of that demise could, should, or might be found, discovered, or opened, in or within the said manors or lordships, or reputed manors or lordships, or any of them, or any part thereof respectively; and also of and in all smelting-mills, stamping-mills, refining-mills, store-houses, work-houses, smiths' forges, bingsteads, sheds, hovels, and buildings, situate, standing, or being in or upon any part of the said moors, commons, or wastes, which then were, or at any time theretofore had been commonly used or employed for mining purposes, together with full and free liberty, power, and authority to and for the said *A. Surtees*, *J. Surtees*, *G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, their executors, &c., and their and every of their agents, miners, workmen and servants, from time to time, and at all times during the continuance of that demise, to dig, sink, drive, work, and make grooves, shafts, pits, drifts, sumps, waygates, adits and levels, and to use all other lawful ways and means whatsoever (hushing in any lands or grounds lying within the said manors, or any of them, and which on the day of the date of the said indenture were inclosed, only excepted, unless the same should be done with the licence and consent in writing of the lords of the said manors for the time being, to be signified as thereafter was mentioned), for the searching for, finding, discovering, winning, working, and getting of the lead, tin, and copper ore, and coal, and all other minerals and fossils of what nature or kind soever, and for working the said quarries, and burning lime in or upon all or any of the moors, commons, wastes, and inclos-

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ed lands, situate, lying, or being in or within or parcel of the manors or lordships or reputed manors or lordships of *Arkindale, New Forest, and Hope* aforesaid, or any of them, or any part thereof respectively; and one third part or share of the said lead, tin, and copper ore, and coal, and all other minerals and fossils of what nature or kind soever, which should be so found, raised, or gotten, to have, lead, and carry away, and take and convert to and for the proper use and benefit of the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, their executors, &c.; but so as that in or by the use or exercise of the powers or authorities thereby given the site or foundation of any house, mill, or other building, should not be hindered, nor the soil in any yard, court, garden, plantation, or orchard, adjoining or contiguous to any house or building, be opened or broken; and also with full and free liberty, power, and authority (but so far only as the said *Sir Charles* could or might lawfully grant the same, and not otherwise,) to and for the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, their executors, &c., and their and every of their agents, miners, workmen, and servants, from time to time and at all times during the continuance of that demise, to have ground-room, heap-room, and pit-room in and upon the said moors, commons, wastes and inclosed lands, as well for the laying and placing, washing, dressing, and storing of the ores, minerals and fossils, coal and stones which should from time to time be so wrought, won, or dug forth or out of the mines and quarries of which one third part was thereafter demised, and arise from the waste hillocks situate upon the said manors or lordships, as also of such stones, earth, gravel, metal and rubbish as should proceed or be had, gotten, or come forth or out of the same mines and quarries in the winning and working thereof; and, for any of those purposes, to make, lay, and use waggon-ways and other ways in, through, over, along, and upon the said

moors, commons, wastes and inclosed lands, and also free way, leave and passage, and ingress, egress and regress in, upon, over and along the said moors, commons, wastes and inclosed lands, as well on foot and on horseback, as with carts, carriages, and horses, to and from the said mines and quarries; And likewise with full and free liberty, power and authority (but so far only as the said Sir *Charles* could or might lawfully grant the same, and not otherwise,) to and for the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, their executors, &c., and their agents, miners, servants and workmen, from time to time and at all times during the continuance of that demise, to divert or turn any water-course or water-courses, and to dig and make any water-courses, drains, adits, levels, trenches, dams, or sluices, in, upon, or through any part of the said moors, commons, wastes and inclosed lands within the said manors or lordships of *Arkindale, New-Forrest*, and *Hope*, or any of them, or any part thereof respectively, for working any machinery or engines for the purpose of mining, or for washing, cleansing, dressing, smelting, refining, or manufacturing the lead, tin and copper ore, and minerals and fossils which should or might be raised or gotten as aforesaid, and be produced from such waste hillocks as aforesaid; And with full and free liberty, power and authority (but so far only as the said Sir *Charles* could or might lawfully grant the same, and not otherwise,) to and for the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, their executors, &c., to do, perform and execute all such other works, matters and things (hushing as aforesaid only excepted) as should or might be necessary for winning and working the said mines and quarries, and dressing and smelting the ore and minerals obtained therefrom and from the waste hillocks upon the said manors or lordships; And also full and free liberty, power and authority to and for the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W.*

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Hall, and *F. Hall*, their executors, &c., during the continuance of that demise, to erect or build in or upon any part of the said moors, commons, wastes, and lands then unclosed, all such smelting-mills, stamping-mills, rolling-mills, crushing-mills, refining-mills, roasting-houses, smiths' forges and furnaces, chimnies, engines, store-houses, hovels, lodges, sheds, bingsteads, and other buildings or erections as should or might be requisite or necessary for the better and more effectually winning and working of the said mines and quarries, and for washing, dressing, smelting, refining and manufacturing the lead, tin and copper ore, fossils, stones and minerals which should be raised or gotten in, within, upon, from or out of the said moors, commons, wastes and inclosed lands and waste hillocks, or any of them, or any part thereof; and also to dig, take and carry away peat and turf off and from the said moors and commons for the purpose of roasting, smelting or refining the ore raised out of the said mines, or for working steam-engines or other engines, and for the use of the miners, agents and workmen employed in working the same both at their dwelling-houses and at the level-heaps or shaft-heaps; and also to take and get ling from the said moors or commons for the like purposes, and also for the purpose of thatching and covering any of the buildings belonging to the said mines, and the houses inhabited by the miners, servants, agents and workmen employed and to be employed in and about the said mines and workhouses, or any of them, and to do and perform all such other matters and things whatsoever (hushing as aforesaid only excepted) that might be requisite or necessary for winning and working the said mines and quarries, and for washing, dressing and cleansing, roasting, smelting, refining and manufacturing the lead, tin and copper ore, fossils and minerals which should or might be gotten or raised within, upon, or out of the said moors, commons, wastes and inclosed lands, or any of them, or any part or parts thereof respectively, the said

A. Surtees, J. Surtees, G. Doubleday, the defendant, *W. Hall*, and *F. Hall*, their executors, &c., using and exercising the liberties, powers and authorities thereby given in such manner as to do as little spoil or damage as might be to the said moors, commons, wastes and inclosed lands, and the soil and herbage thereof, and making such compensation and satisfaction from time to time for any spoil or damage to be done to such present inclosed lands or grounds in or by the use or exercise of all or any of the liberties, powers or authorities thereby given or granted, as were hereinafter mentioned: To have and to hold the said undivided third part or share of the said mines, minerals and quarries, and all other the premises thereinbefore mentioned, and intended to be thereby demised, and all and singular the powers, privileges and authorities thereby given or granted, with the appurtenances, to the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, their executors, &c., from the 1st *January* next ensuing the day of the date thereof, for and during the term of nineteen years, &c., at and under a certain rent payable by the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, to the said Sir *Charles*, his heirs and assigns, as in the said indenture was mentioned: and the said defendant did, in and by the said indenture of lease, for himself and his heirs, executors, &c., covenant, promise and agree to and with the said Sir *Charles*, his heirs and assigns (amongst other things), in manner following (that is to say), that the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, their executors, &c., should and would, during the continuance of the said demise, maintain, preserve and keep the said smelting-mill engaged to be erected and built by them, with the water-wheel to the same belonging, and the lobbies, ore-house, and other houses, bingsteads, sheds and other buildings already erected, and which dur-

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ing the continuance of that demise should be erected contiguous or near to the said mill, and all water-courses, drains and sluices which should lead to, or have any communication therewith, in good and sufficient condition and repair; and should and would, at the expiration or other sooner determination of the said term, yield and deliver up the same in good and sufficient condition and repair, and should and would also, at the expiration or other sooner determination of the said term, quit and deliver up in good and sufficient order and repair all such smiths' forges, workhouses, storehouses, wood-houses, sheds, hovels, and other buildings, as should within two years next preceding the expiration or other sooner determination of the said demise, be used, occupied or employed by the said *A. Surtees, J. Surtees, G. Doubleday*, the defendant, *W. Hall*, and *F. Hall*, their executors, &c., agents or workmen, for mining purposes.

The declaration then averred an assignment of the reversion of and in the demised premises by Sir *Charles* to one *George Brown*, his heirs and assigns; and that the said *George Brown* devised the same to the plaintiffs, and died, whereby the plaintiffs became and were seised of the said demised premises in their demesne as of fee.

Three breaches were assigned:—

First—That the said defendant did not nor would, nor did nor would the said *A. Surtees, J. Surtees, G. Doubleday, W. Hall*, and *F. Hall*, or any of them, during the continuance of the said demise by the said first-mentioned indenture granted, and after the plaintiffs became so seised of the said reversion of and in the demised premises as aforesaid, and after the death of *George Brown*, to wit, on &c., and for a long space of time, to wit, from thence until the determination of the said term by the said first-mentioned indenture granted, or at any time during the said demise, erect or build, at their own expense or otherwise, a smelting-mill of larger dimensions than the said

smelting-mill so taken down as in the said first-mentioned indenture in that behalf mentioned, with a water-wheel and adjoining buildings, upon another part of the said tract of waste ground in the said first-mentioned indenture mentioned, according to the tenor and effect, true intent and meaning of the said first-mentioned indenture, and of the said covenant so in that behalf made as aforesaid, but wholly neglected and refused so to do; and the said smelting-mill of larger dimensions, with the water-wheel and buildings as aforesaid, were unerected and unbuilt, contrary to the tenor and effect of the said first-mentioned indenture, and of the covenant so made as aforesaid, to wit, at &c.; and that, by reason of the said breach of covenant, the said demised premises were of much less value, to wit, less by 3,000*l.*, than they otherwise would have been, and that the plaintiffs had not been able to sell or let, and had been hindered and prevented from either selling or letting the same for so large a price or at so large a rent or so beneficially or advantageously as they otherwise might have done.

Secondly—That the defendant did not nor would, nor did nor would the said *A. Surtees, J. Surtees, G. Doubleday, W. Hall,* and *F. Hall*, or any of them, during the continuance of the said demise, and whilst the plaintiffs were so seised as last aforesaid, and after the death of the said *George Brown*, maintain, preserve and keep the said smelting-mill instead of the said smelting-mill and premises so taken down as aforesaid in the said indenture in this count first mentioned, erected and built by them, with the water-wheel to the same belonging, and the lobbies, ore-houses, and other houses, bingsteads, sheds and other buildings erected contiguous or near to the said last-mentioned mill, and all water-courses, dams and sluices which led to or had any communication therewith, in good and sufficient condition and repair, according to the form and effect, true intent and meaning of the said first-mentioned indenture

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in that behalf; but, on the contrary thereof, the defendant and the said *A. Surtees, J. Surtees, G. Doubleday, W. Hall, and F. Hall*, after the making of the said first-mentioned indenture, and during the continuance of the said demise, and after the death of the said *George Brown*, and after the plaintiffs became so seised as last aforesaid, to wit, on &c., and from thence for a long space of time, to wit, from thence until the determination of the said term, suffered and permitted the said smelting-mill erected and built, with the water-wheel to the same belonging, and the lobbies, ore-houses, and other houses, bingsteads, sheds and other buildings, as in the first-mentioned indenture mentioned, and the water-courses, dams and sluices which led to and had communication therewith, to be and continue, and the same were for and during all that time ruinous, prostrate, fallen down, foul, miry, choked up and in great decay, and in bad and insufficient condition and repair, for want of needful and necessary maintaining, preserving and keeping the same in good and sufficient condition and repair; contrary, &c., &c.

Thirdly—That the defendant did not nor would, nor did nor would the said *A. Surtees, J. Surtees, G. Doubleday, W. Hall, and F. Hall*, at the expiration of the said term, yield up or deliver up the said smelting-mill engaged to be erected and built as in the said indenture mentioned, with the water-wheel to the same belonging, and the lobbies, ore-houses and other houses, bingsteads, sheds and other buildings contiguous or near to the said mill, as in the said first-mentioned indenture mentioned, and all water-courses, dams and sluices which led to or had any communication therewith, in good and sufficient condition and repair, according to the form and effect of the said first-mentioned indenture and covenant so made by the said defendant as aforesaid, &c. &c.

The defendant demurred generally, and the plaintiffs joined in demurrer.

The Court of *King's Bench* having given judgment for the plaintiffs below, the defendant below brought a writ of error.

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The points to be argued in support of the error were—*first*, “that the lease mentioned and set forth in the pleadings did not contain any covenant, expressed or implied, by the lessees with the lessor, to erect a smelting-mill of larger dimensions than the smelting-mill recited to have been taken down, with a water-wheel and adjoining buildings;”—*secondly*, “that, assuming such a covenant to be contained in the lease, it was a covenant running with the land, and the plaintiffs had not shewn any title to the waste upon which the mill was to have been built.”

Mr. *Broderick*, for the plaintiff in error.—In the consideration of this case, it becomes material to look to the terms of the demise, and also to the nature of the interest of the lessor in the wastes in question.

The first question is, whether there is any covenant, express or implied, on the part of the lessees to erect a smelting-mill; the second, whether, supposing that the demise does embrace such a covenant, it passed to the assignee of the reversion, so as to give him a right of action for the non-erection.

First.—At the time of making the demise, the mill was not in existence; it had been taken down in pursuance of an agreement entered into by the defendant and the other lessees with Sir *Charles Turner* and two other individuals who were, jointly with him, interested in the wastes. There is clearly no express demise of the mill, and the only question that can arise, is, whether a demise may be implied from the contract made by the lessees to erect a mill. The case of *Saltoun v. Houston* (a), which was the principal

(a) 8 J. B. Moore, 546; S. C. 1 to by A. of the first, B. of the second, and C. of the third part—
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authority upon this point relied on in argument in the Court below, is materially distinguishable from the present; inasmuch as here the recital of the deed shews that there was an actual existing agreement relating to the rebuilding of the mill, between different parties—an express contract by the defendant and his co-lessees with Sir *Charles Turner* jointly with two other persons; and, when built, the mill would belong to the three jointly. The Court cannot, therefore, imply a separate contract to the same effect with Sir *Charles* alone. *Expressum facit cessare tacitum*. The lessees being liable upon their express contract to the three, cannot also be liable upon an implied contract to Sir *Charles*, nor, consequently, to his assignee.

Secondly.—Supposing such an implied covenant may be collected from the whole of the demise, is it a covenant which runs with the land, so as to entitle the assignee of the

after reciting, that it had been agreed that *A.* should retire from the business, and *B.* and *C.* become partners for ten years, to be computed from the day of the date of the deed; that the capital of the copartnership should consist of 36,000*l.*, 24,000*l.* of which should be advanced by *A.* for *B.*, and 12,000*l.* to be advanced by *C.* as his proportion—the deed proceeded to state, “that whereas an account of all the debts and credits of *A.*, in his business of merchant, had been that day taken, and the balance in his favour amounted to 38,033*l.*; and whereas it had been agreed by and between *A.*, *B.*, and *C.*, that the whole of the debts and credits of *A.* should be received and paid by *B.* and *C.*, and that the balance of 38,033*l.* should be accounted for and paid by them in manner there-

inafter mentioned; and that, for the better enabling them to collect and receive such credits, *A.*, by indenture, had assigned the debts and credits to them:” and the deed further witnessed that it was thereby agreed, “that, in consideration of 12,000*l.* paid to *A.* by *C.*, as his share of the capital, and for raising 24,000*l.* as *B.*’s share of such capital, the sum of 36,000*l.*, part of the 38,033*l.* was to be retained by *B.* and *C.*, as their capital or joint stock, and the remaining 2,033*l.* paid to *A.* by instalments, at six, twelve, eighteen, and twenty-four months, without interest; and, if any of the debts should prove bad, the loss should be borne by *B.* and *C.*:—*Held*, that this deed amounted to a covenant by *B.* and *C.* to pay the debts due from *A.* in his business on the day of the date of the indenture.

reversion to sue thereon? The leading authority upon this subject is *Spencer's case* (a), where the rule is thus laid down:—"When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but, when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as, if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed appurtenant to houses, and shall bind the assignee, although he be not bound expressly by the covenant: but, in the case at bar, the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee; for, the law will not annex the covenant to a thing which hath no being." Second resolution, "that, in this case, if the lessee had covenanted, for him and his assigns, that they would make a new wall upon some part of the thing demised, that, forasmuch as it is to be done upon the land demised, it should bind the assignee; for, although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. But, although the covenant be for him and his assigns, yet, if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged: as, if the lessee covenants, for him and his assigns, to build a house upon the land of the lessor which is no part of the demise, or to pay any collateral

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(a) 5 Rep. 16.

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sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised or that is assigned over, and therefore in such case the assignee of the thing demised cannot be charged with it no more than any other stranger." Here, the covenant (if any) is, to erect the mill, &c., upon the waste lands of the manors mentioned in the deed. The waste itself was not demised; nor does it appear that it even belonged to the lessor: at most, he appears to have had only the right to erect works thereon for mining purposes. It is therefore like a covenant to erect a mill upon the land of a stranger, which clearly is not a covenant running with the land. In the argument in the Court below, it is assumed that the mill in question was not merely collateral to the enjoyment of the mines, but materially tending to their maintenance. The mill, however, can no more be said to be connected with the working or maintenance of the mines, than could a corn mill be said to be connected with the cultivation and enjoyment of land. The judgment of the Court of *King's Bench* seems also to have proceeded upon the same ground; for, Lord *Tenterden* says (a): "The building that the lessees covenanted to erect and maintain was of this kind: it was to be built for mining purposes; it was to be used for those purposes; it was to be the property of the mines; it related to the mines, and to the mines only; it could not be the property of the owners of the mines, except in that character; if severed from its connection, it would not belong to the owners. Can it then be said that these covenants concern a matter collateral to or unconnected with the tenements demised?" The only use of the smelting-mill, is the purifying the ore after it is dug up from the mines; it is not necessary to the obtaining of the ore, like a shaft, or the engines used for working mines. The mill,

(a) 9 Barn. & Cress. 515.

therefore, if erected, would only be collateral to the enjoyment of the mines, and consequently the covenant to erect it was not a covenant running with the land. *Vernon v. Smith* (a), and *Vyvyan v. Arthur* (b), are clearly distinguishable, the covenants in both those cases evidently not being severable from or unconnected with the subject-matter of the demise.

Mr. *E. H. Alderson*, *contra*, was stopped by the Court.

Lord Chief Baron ALEXANDER (c) delivered the judgment of the Court:—

The argument on the part of the plaintiff in error in this case resolves itself into two points—*first*, whether there be any covenant at all on the part of the lessees in the indenture in question mentioned with Sir *Charles Turner*, the lessor, to erect a smelting-mill—*secondly*, whether, if any such

(a) 5 Barn. & Ald. 1, where it was held that a covenant to insure against fire, premises situate within the weekly bills of mortality, as specified in the statute 14 Geo. 3, c. 78, runs with the land.

(b) 2 Dow. & Ryl. 670; S. C. 1 B. & C. 410. A testator being seised in fee of certain lands, and also of a corn-mill, demised the former to a tenant for three lives, covenanting for a money rent, and, in addition thereto, that the lessee should perform certain suits and services, amongst others, that he, his heirs and assigns, should do suit to the lessor's mill by grinding therein all such corn as grew upon the demised land. The testator afterwards devised the mill and also the reversion of the land to the same person, who became

seised upon the death of the deviser. During the demise of the land, the lessee died intestate, and his wife took out administration of his estate and effects. An action of covenant being brought, assigning for breach a neglect to grind corn at the mill during the life-time of the lessee, and also since his death—it was held that the reservation of the suit to the mill was in the nature of a rent, and that the covenant to render it ran with the land whilst the ownership of the land and the mill remained in the same person, and entitled the latter to maintain an action at common law upon it against the personal representative of the lessee.

(c) Lord Chief Justice *Tindal* was absent.

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covenant exists, it is a covenant running with the land, so as to affect the assignee of the reversion of Sir *Charles*.

Upon the first point, we are of opinion that there is a distinct covenant to the effect above mentioned in the demise. In *Comyns's Digest* (a), it is laid down "that any words in a deed which shew an agreement to do a thing, make a covenant;" and it is perfectly clear that covenant will lie upon words of agreement contained in the recital of a deed. Upon the face of the declaration in this case is manifestly disclosed a covenant on the part of the lessees to erect a smelting-mill on a part of the waste of the manor demised. The deed recites that the lessees had "by and with the permission of the said Sir *Charles*, &c., taken down a smelting-mill belonging to them, situate upon part of a tract of waste ground within the manor of *Arkindale*, called *Old Moulds*, and some other contiguous buildings, and *did engage to erect*, at their own expense, a smelting-mill of larger dimensions, with several adjoining buildings, upon another part of the said tract of waste ground, which mill, with the water-wheel belonging thereto, and the said other buildings, it had been agreed should belong to and be the property of the said Sir *Charles*, &c., in lieu of the said mill and buildings so taken down;" and Sir *Charles* then demises to the defendant and the other lessees, "All that the undivided third part or share of the said Sir *Charles* of and in all and singular the mines, veins, pipes, floats, strings, and parcels of lead, tin, and copper ore, and other minerals and fossils of what nature or kind soever, which were then known, found, or discovered, or which could, should, or might, during the continuance of that demise, be opened, known, found, discovered, or gotten, in, within, upon, from, or under all the moors, commons, wastes, and inclosed lands, situate, lying, or being in or within or parcel of the several manors or lordships, or reputed manors or lord-

(a) Com. Dig. tit. "Covenant," (A. 2.).

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ships of *Arkindale*, *New Forest*, and *Hope*, in the county of *York*, or any of them, or any part thereof respectively; and also of and in all mines and seams of coal, and quarries of stone then found, discovered, or opened, or which, during the continuance of that demise, could, should, or might be found, discovered, or opened in or within the said manors, &c., or any of them, or any part thereof respectively; and also of and in all smelting-mills, stamping-mills, refining-mills, store-houses, work-houses, smiths' forges, bingsteads, sheds, hovels and buildings, situate, standing, or being in or upon any part of the said moors, commons, or wastes, which then were or at any time theretofore had been commonly used or employed for mining purposes." And the defendant, for himself and his heirs, executors, &c., covenanted with Sir *Charles*, his heirs and assigns, (amongst other things), "that the said lessees, their executors, &c., should and would, during the continuance of the said demise, maintain, preserve and keep *the said smelting-mill engaged to be erected and built by them*, with the water-wheel to the same belonging, and the lobbies, ore-houses, and other houses, bingsteads, sheds, and other buildings already erected, and which, during the continuance of that demise, should be erected contiguous or near to the said mill, and all water-courses, &c., in good and sufficient condition and repair, and should and would, at the expiration or other sooner determination of the said term, yield and deliver up the same in good and sufficient condition and repair, &c. &c." Upon this, we are of opinion that there is a distinct covenant on the part of the defendant binding him and his assigns to erect the smelting-mill in question; and that the assignee of Sir *Charles Turner* is entitled to the benefit of that covenant.

The rule laid down in *Spencer's* case shews that all covenants connected with the thing demised, and important to the future use thereof, run with the land. And in the case of *The Mayor of Congleton v. Pattison*, Lord *Ellen-*

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borough says (a): "A covenant in which the assignee is specifically named, though it were for a thing not *in esse* at the time, yet, being specifically named, it would bind him, if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances; or if it affected the mode of enjoying it." That is the general rule to be deduced from all the authorities upon this subject.

It has been contended that there is no demise of the smelting-mill, and that there is no necessary connection between the smelting-mill and the mines. The demise is of a third part of the mines, &c., and also of "all smelting-mills, stamping-mills, &c., situate upon any part of the moors, &c., which were, or at any time had been used for mining purposes; Together with full and free liberty, power, and authority to and for the said lessees, their executors, &c., and their and every of their agents, miners, workmen and servants, from time to time, and at all times during the continuance of that demise, to dig, sink, drive, work and make grooves, shafts, pits, &c., and to use all other lawful ways and means whatsoever (hushing in inclosed lands only excepted), during the continuance of that demise, for the searching for, finding, &c., of the lead, tin and copper ore, coal, and all other minerals and fossils of what nature or kind soever, and for working the said quarries, and burning lime in or upon all or any of the moors, &c., situate, lying or being in or within or parcel of the manors of *Arkindale*, &c., or any of them, or any part thereof respectively, and one third part or share of the said lead, tin or copper ore and coal, and all other minerals and fossils of what nature or kind soever, which should be so found, raised or gotten, to have, lead and carry away, and take and convert to and for the proper use and benefit of the said lessees, their executors, administrators and assigns, &c. &c.;

(a) 10 East, 185.

And also with full and free liberty, power and authority (but so far only as the said Sir *Charles* could or might lawfully grant the same, and not otherwise), to and for the said lessees, their executors, &c., and their and every of their agents, miners, &c., from time to time, and at all times during the continuance of that demise, to have ground-room, heap-room and pit-room in and upon the said moors, &c., as well for the laying and placing, &c., of the ores, &c., which should from time to time be so wrought, won, or dug forth or out of the mines and quarries of which one third part was thereinbefore demised, and arise from the waste hillocks situate upon the said manors or lordships, as also of such stones, earth, &c., as should proceed, &c., out of the same mines and quarries in the winning and working thereof; and, for any of those purposes, to make, lay and use waggon-ways and other ways in, &c., the said moors, &c., and also free way, &c., and ingress, egress and regress in, upon, over and along the said moors, &c., to and from the said mines and quarries; And likewise with full and free liberty, power and authority (but so far only as the said Sir *Charles* could or might lawfully grant the same, and not otherwise,) to and for the said lessees, their executors, &c., and their agents, &c., from time to time, and at all times during the continuance of that demise, to divert or turn any water-course or water-courses, and to dig and make any water-courses, drains, &c., in, upon, or through any part of the said moors, &c., within the said manors of *Arkindale*, *New Forest*, and *Hope*, or any of them, or any part thereof respectively, for working any machinery or engines for the purpose of mining, or for washing, &c., the lead, &c., which should or might be raised or gotten as aforesaid; And with full and free liberty, power and authority (but so far only as the said Sir *Charles* could or might lawfully grant the same, and not otherwise,) to and for the lessees, their executors, &c., to do, perform and execute all such other works, matters, and

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things (hushing as aforesaid only excepted), as should or might be necessary for winning and working the said mines and quarries, and dressing and smelting the ore and minerals obtained therefrom and from the waste hillocks upon the said manors or lordships: And also full and free liberty, power and authority to and for the lessees, their executors, &c., during the continuance of that demise, *to erect or build in or upon any part of the said moors, &c.*, all such smelting-mills, &c., as should or might be requisite or necessary for the better and more effectually winning and working of the said mines and quarries, and for washing, &c., the lead, tin and copper ore, &c., which should be raised or gotten, in, within, upon, from or out of the said moors, &c." All these are clearly connected with the demise. It might be a question whether the deed did not amount to an absolute demise of all Sir *Charles Turner's* interest in the moors upon which the smelting-mill was to be built. It is not necessary, however, to go that length upon the present occasion: it is sufficient to say that we think the possession of the smelting-mill is directly connected with the enjoyment of the mines; and although, as has been contended, it may not be necessary to the enjoyment of the mines, yet it clearly affects the mode of enjoying them. We therefore think that this case falls within the general principle laid down in *The Mayor of Congleton v. Pattison*, as collected from all the authorities; and that this is a covenant running with the land.

One argument on the part of the plaintiff in error is, that a covenant with Sir *Charles* alone cannot be implied, because the agreement recited in the indenture is with Sir *Charles* jointly with two others; but we think, upon the whole deed, the covenant is separate with Sir *Charles* as to the one third which he had the right to demise.

We therefore affirm the judgment of the Court below.

Judgment affirmed.

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REG. GEN.

REGULA GENERALIS.

IT IS ORDERED, that, from henceforth, in all special arguments in this Court, notice in writing of the points which are intended to be insisted upon by each of the parties, be delivered to the Judges at their chambers two days before the day on which the case shall be set down for hearing, either by marking the points in the margin of the books delivered to the Judges, or on separate paper; and that each of the parties do, within the same time, leave a copy of such notice at the chambers of the Lord Chief Justice, to be delivered to the adverse party upon his application.

As to special arguments—
marking the
points to be argued.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

J. B. BOSANQUET.

MEMORANDA.

ON *Saturday*, the 26th *June*, his Majesty King *George* the Fourth departed this life. Mr. Justice *Gaselee* sat for a short time in Court, for the purpose of taking bail.

On *Monday*, the 28th, at the sitting of the Court, Mr. Secondary *Cancellor* administered to the respective Judges and King's Serjeants, the usual oaths of allegiance, &c., to his Majesty King *William* the Fourth.

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Monday,
June 28th,

One of two partners, after an act of bankruptcy by him alone, paid to the agent of a creditor a debt due from the firm, the agent having notice of such act of bankruptcy:—*Held*, that this was not a payment protected by the 82nd section of the 6 Geo. 4, c. 16; the moiety of the partnership property belonging to the bankrupt partner being by the act of bankruptcy vested in his assignees; and, as to the moiety of the solvent partner, the payment being made without authority, as the bankruptcy destroyed the implied agency resulting from the partnership.

CRAVEN and Others, Assignees of WILLIAM and BENJAMIN ALDRED, Bankrupts, v. EDMONDSON.

THIS was an action of *assumpsit* brought by the plaintiffs, as assignees of *William* and *Benjamin Aldred*, bankrupts, to recover from the defendant a sum of 92*l.* paid by *William Aldred*, on account of a joint debt due to the defendant from himself and his brother *Benjamin*, after he (*William*) had committed an act of bankruptcy; *Benjamin* at that period remaining solvent. The fifth count of the declaration alleged that the defendant, after the bankruptcy of *William Aldred*, was indebted to *Benjamin* and the assignees of *William*; the sixth, that he was indebted to the plaintiffs, as assignees of *William*; and the seventh, that he was indebted to them as assignees of both partners.

The case was tried before Mr. Justice *Park*, at the last Assizes for the county of *York*. The facts which appeared in evidence were as follow:—*William* and *Benjamin Aldred* traded in partnership, and were indebted to the defendant in the sum of 92*l.*, for wool. In the month of *October* last, *William Aldred* left his residence in the neighbourhood of *Leeds*, saying that he was going to *Bradford*. It appeared, however, that he had gone to *Liverpool*, whither he was followed by the brother of the defendant, who, on meeting with him there, caused him to be arrested; whereupon *William Aldred* paid the amount of the debt to the officer. *Benjamin Aldred* was ignorant of his brother's motive for leaving home, and was left by him totally destitute of funds. The defendant's brother, who was called as a witness, stated that he went to *Liverpool* for the purpose of buying hides, and also to see *William Aldred* if he could. A commission issued against *William Aldred* on the 2nd *November* last, when he was declared a bankrupt; but he never surrendered.

On the part of the defendant, it was contended that a payment of a partnership debt by one of several partners after an act of bankruptcy committed by him alone, was a payment protected by the 82nd section of the statute 6 Geo. 4, c. 16 (a). It was also contended, that there was nothing in the evidence to shew that *William Aldred* went to *Liverpool* with a view to defeat or delay his creditors; nor that the defendant was, at the time the money was paid, aware of an act of bankruptcy having been committed by him.

The learned Judge reserved for the opinion of the Court the question upon the construction of the 82nd section; and left it to the Jury to say what was the intent of *William Aldred* in absenting himself from his usual place of abode; telling them, that, if he departed therefrom with a view to avoid his creditors, he thereby committed an act of bankruptcy; and that, if the agent of the defendant, to whom the money was paid, knew of the fact of his departure from home with such intent, it might be assumed that he had notice of his bankruptcy.

The Jury found that the intent of *William Aldred* in going to *Liverpool* was that he might thereby avoid his creditors; and that the agent of the defendant had notice of

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(a) By which it is enacted—
“ That all payments *bond fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments *bond fide* made, or which shall hereafter be made to

any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt: Provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.”

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that fact at the time he received the money; and they accordingly returned a verdict for the plaintiffs, for the amount of the sum claimed.

Mr. Serjeant *Jones*, in the last term, moved for a rule *nisi* that this verdict might be set aside and a nonsuit entered, or a new trial had.—A payment made by *Benjamin*, the solvent partner, would undoubtedly have been a good payment. *Fox v. Hanbury* (a), *Smith v. Stokes* (b), *Smith v. Oriell* (c), *Harvey v. Crickett* (d). In *Lacy v. Woolcott* (e), a bill of exchange accepted (in the name of the firm) by one of two partners after he had committed an act of bankruptcy, was held to be an available security in the hands of an innocent indorsee. That case is precisely in point, for here also the payment was made in virtue of the liability of the firm. At all events, supposing the payment to be void as to the moiety of the bankrupt partner, it would still be a valid payment *quoad* the moiety of the solvent partner.

The learned Serjeant further contended that the notice of the bankruptcy to the agent of the defendant was not notice to the defendant himself within the meaning of the section; and also that the verdict was against evidence.

The Court, however, granted the rule upon the first ground only. The points remaining to be considered, therefore, were—*first*, whether a payment made by one of two partners who has become bankrupt, on account of a debt due from the firm, the other partner remaining solvent, is a payment protected by the 6 *Geo.* 4, c. 16, s. 82; —*secondly*, whether, if it be not protected *quoad* the whole of the debt, it is not so *quoad* the moiety of the solvent partner.

(a) Cowp. 445.
 (b) 1 East, 363.
 (c) Ibid. 368.

(d) 5 Mau. & Selw. 336.
 (e) 2 Dow. & Ryl. 458.

Mr. Serjeant *Wilde* now shewed cause.—A payment made by a solvent partner after the bankruptcy of another, clearly cannot be recovered back by the assignees of the latter. But in this case, the payment being made after an act of bankruptcy committed by the partner by whom it was made, was, as to one moiety, a parting with the money of his assignees, and, as to the other, a payment of the money of the solvent partner, without any authority; for the bankruptcy operated a dissolution of the partnership, and consequently destroyed the implied agency resulting therefrom. In *Smith v. Goddard* (a), the first payment was made by an authorized agent of the solvent partner. In *Thomason v. Frere* (b), two of three partners affecting, but without authority, to bind the firm, by deed assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home, and afterwards, by direction of such correspondent, drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order, for the amount of the debt; the two partners, having in the meantime committed acts of bankruptcy, indorsed such bill to the creditor of the firm in part satisfaction of his debt, and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned; the other partner being all the time abroad—it was held, that, by such indorsement of the bill by the two after acts of bankruptcy, nothing passed to the creditor; for, the bankrupt partners had ceased to have any control over the joint stock, and therefore could not bind either the property of their assignees or of the then solvent partner. Mr. Justice *Le Blanc* there said (c): “After the acts of bankruptcy committed by *Underhill* and *Guest*, followed up as they were by commissions and assignments, they ceased to have any control or disposition over the joint property;

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(a) 3 Bos. & Pul. 465.

(b) 10 East, 418.

(c) Ibid. 424.

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and therefore their indorsement of the bill to the defendants, after such acts of bankruptcy, was made by persons having no authority to dispose in that manner of the partnership fund or property; and the present plaintiffs, in whom by operation of law the whole property was vested from that time, are entitled to recover back the money received on the bill, as money received to the use of *Thomason* and of the respective assignees." Payments protected by the 82nd section of the 6 *Geo.* 4, c. 16, are such as are made *bond fide*, and without notice of an act of bankruptcy. Here, the Jury have found that the defendant's agent, at the time he received the money, had notice of the bankruptcy of *William Aldred*.

Mr. Serjeant *Jones*, in support of his rule.—The facts of the case are shortly these:—*Benjamin* and *William Aldred* carried on business in partnership. The defendant was a creditor of the firm. *William Aldred*, becoming insolvent, absconded; *Benjamin* continuing for some time solvent. The brother of the defendant followed *William Aldred* to *Liverpool*, issued a writ against him, and succeeded in obtaining payment of the debt due from the firm to the defendant. Now, it is perfectly clear, that, if the money had been paid by *Benjamin*, the plaintiffs could not have recovered it back. The argument on the other side amounts to this—that the agency of the bankrupt partner ceases upon an act of bankruptcy committed by him, followed by a commission and assignment. If that were so, the solvent partner could not be the agent of the bankrupt partner: and it is settled by a variety of cases, that a payment by a solvent partner, of a partnership debt, after an act of bankruptcy committed by the other, is a good payment—because, *quoad* this matter, the solvent partner is the agent of the insolvent.

[Lord Chief Justice *Tindal*.—In *Thomason v. Frere*, it was held that the indorsement of a bill by the insolvent

partners was not available; it seems therefore singular that an acceptance should be. In *Lacy v. Woolcott*, however, the bill was accepted after a *secret* act of bankruptcy by the partner who accepted it. Here, the payment was made to a party having knowledge of the act of bankruptcy].

If the solvent partner may be the agent of the bankrupt, by parity of reasoning, the bankrupt may be the agent of the solvent partner. At all events, the agency *quoad* by-gone transactions is not determined, though perhaps it may be as to future. The proviso in the 82nd section of the 6 Geo. 4, c. 16, only applies to the case of an individual bankrupt.

Lord Chief Justice TINDAL.—This was an action brought by the assignees of *William* and *Benjamin Aldred*, to recover a sum of money paid by *William Aldred* to the defendant, after the commission of an act of bankruptcy by him, on account of a debt due to the defendant from the bankrupt jointly with his brother, *Benjamin Aldred*, who remained solvent; and the principal question is, whether (the agent of the defendant who received the money having at the time knowledge of the bankruptcy of *William Aldred*,) the payment is protected by the 82nd section of the statute 6 Geo. 4, c. 16, which enacts—"That all payments *bond fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments *bond fide* made, or which shall hereafter be made to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt: Provided the person so dealing

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with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

Under the circumstances of the case, if the payment had been made by *William Aldred* upon his own account alone, there can be no doubt but that the sum so paid might be recovered back by the assignees. But it has been contended that the proviso in the bankrupt act above referred to applies only to the case of an individual bankrupt, and not to a case like the present, where one of the partners remains solvent. No authority has been cited in support of that proposition. We must therefore ascertain in whom the property in this sum of money was vested at the time of the payment. *William Aldred* having committed an act of bankruptcy, upon which a commission was subsequently sued out against him, the one moiety by relation belonged to his assignees when chosen, and the other moiety to *Benjamin*, as tenants in common. The bankrupt clearly had no right to pay over money belonging to his brother. It has been insisted that he had a right, as the agent of *Benjamin*, to make the payment. The bankruptcy of one partner destroys the implied agency arising out of the partnership; though not perhaps for all purposes, as appears from the case of *Lacy v. Woolcott*, where a bill of exchange accepted (in the name of the firm) by one of two partners after he had committed an act of bankruptcy, was still held to be an available security in the hands of an innocent indorsee—upon the general principle, that a renunciation does not destroy the agency, unless the fact of such renunciation be made known to the parties to be affected by it. Here, the defendant (in the person of his agent) had notice, at the time the payment in question was made, that the agency of *William Aldred* was destroyed by the act of bankruptcy committed by him; and the effect of such act of bankruptcy upon the respective rights of the parties being, to vest in his assignees the moiety of the partnership property that formerly belonged to him,

it follows that, as to the one moiety, the money so paid by the bankrupt was the money of his assignees, and, as to the other moiety, that it was paid by him without any authority: the whole, therefore, may be recovered back.

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Mr. Justice PARK and Mr. Justice GASELEE concurred.

Mr. Justice BOSANQUET.—I am of the same opinion. From the time of his bankruptcy, *William Aldred* ceased to have any interest in the partnership property; his share vested in his assignees when they should be chosen: *Benjamin Aldred*, therefore, became tenant in common of the property, with the assignees of *William*. The latter had no right to make a payment on account of his brother without his express authority. The defendant had notice of the bankruptcy of *William Aldred* at the time he received payment of his debt from him. The only question is, whether, under these circumstances, the payment was protected by the 82nd sect. of the 6 Geo. 4, c. 16. I am clearly of opinion that such payment was not within the protection of that clause. The payment by *William Aldred* on his own account is not protected, because the party who received the money had notice of his bankruptcy at the time he so received it; and, with respect to the other partner, the payment was not made by him, nor on his behalf, for the reasons already given.

Rule discharged.

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*Monday,
June 28th.*

The plaintiff, who was about to proceed from *S.* to *London*, by the defendants' coach, received from one *G.*, at a village near *S.*, a parcel containing a 50*l.* bank-note, with instructions to book it at the defendants' office at *S.* The plaintiff neglected to book the parcel at *S.*, but placed it in a carpet-bag containing wearing-apparel. The bag and its contents were lost. In an action against the defendants for negligence, the Jury having returned a verdict for the plaintiff for the value of the wearing-apparel only—The Court refused to increase the verdict by the amount of the note.

MILES v. CATTLE and Another.

THIS was an action on the case against the defendants, as carriers, for the loss of a carpet-bag belonging to the plaintiff, containing certain wearing-apparel of the plaintiff, and also a parcel in which was inclosed a bank-note for 50*l.*, belonging to a third person.

The *first* count of the declaration stated that the defendants, before and at the time of committing the grievances thereafter next mentioned, were owners and proprietors of a certain common stage-coach for the carriage and conveyance of passengers and their luggage from *Stockton* to *York*, for hire and reward to them the defendants in that behalf, to wit, at &c.; that the defendants being such owners and proprietors, theretofore, to wit, on &c., at &c., the plaintiff, at the special instance and request of the defendants, became and was a passenger in the same coach, to be safely and securely carried and conveyed thereby, together with his luggage, from *Stockton* to *York*, for a certain fee and reward to the defendants in that behalf; and the defendants then and there received the plaintiff as such passenger, together with his luggage, to wit, a certain bag containing divers goods and chattels, to wit, &c., &c., of great value, to wit of the value of 50*l.*, and a certain note of the Governor and Company of the Bank of *England*, commonly called a bank-note, for the payment of 50*l.*, and of the value of 50*l.*, of the said plaintiff; and that thereupon it became and was the duty of the defendants to use due and proper care that the plaintiff and his luggage should be safely and securely carried and conveyed by and upon the said coach, from *Stockton* to *York*: yet that the defendants, not regarding their duty in that behalf, did not use due and proper care that the plaintiff and his luggage should be safely and securely carried and conveyed by and upon the said coach from *Stockton* to

York, but wholly neglected so to do; and so carelessly and negligently conducted themselves with respect to the said luggage of the plaintiff, that the same, by and through the carelessness and negligence of the defendants in that behalf, became and was totally lost to the plaintiff, to wit, at &c.

The *second*, *third*, and *fourth* counts were substantially the same as the *first*.

The *fifth* count stated that the defendants were the keepers of a certain coach-office for the reception and safe custody of the luggage of passengers for hire, coming to, or going from the coach-office by any coach for the conveyance of passengers for hire, whereof the defendants were proprietors; that the plaintiff, afterwards, to wit, on &c., came to the coach-office as a passenger for hire from *Stockton* in and by a certain coach for the conveyance of passengers for hire, whereof the defendants then were proprietors, with certain luggage of him the plaintiff, to wit, a certain other bag, containing, &c., &c., and thereupon, then and there, at the special instance and request of the defendants, caused the last-mentioned bag, with the contents thereof, to be placed in the coach-office, to be safely and securely kept for the plaintiff by the defendants, who then and there received the same for the purpose aforesaid; whereupon it then and there became and was the duty of the defendants to use due and proper care in the keeping and taking care of the last-mentioned bag of the plaintiff, with the contents thereof; yet that the defendants, not regarding their duty in that behalf, took such bad care of the last-mentioned bag, and the contents thereof, and so carelessly and negligently conducted themselves in that behalf, that the last-mentioned bag, with the contents thereof, afterwards, to wit, on &c., by and through the carelessness and negligence of the defendants, became and were wholly lost to the plaintiff, to wit, at &c.

The cause was tried before Mr. Justice *Park*, at the last

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Spring Assizes for the county of York. The evidence was as follows:—

The plaintiff, who was about to proceed from *Stockton* to *York* by one of the defendants' coaches, and thence to *London*, was entrusted by one *Garbut*, a solicitor, residing at *Yarm*, near *Stockton*, with a parcel, containing certain papers and also a 50*l.* bank-note, addressed to Messrs. *Bell & Brodrick*, his *London* agents, with instructions to book the parcel at the defendants' coach-office at *Stockton*. The plaintiff, however, instead of complying with this direction, placed the parcel in a carpet-bag with his clothes, intending to carry it himself. Soon after the arrival of the coach at *York*, the carpet-bag of the plaintiff was missed, and, notwithstanding every endeavour to find it, was never recovered. There was evidence of negligence in both parties.

A verdict was found for the plaintiff, for 15*l.*, the value of the clothes contained in the bag; with liberty to move to increase the verdict to 65*l.*, if the Court should consider him entitled to recover for the 50*l.* note.

Mr. Serjeant *Wilde*, in the last term, on the part of the plaintiff, accordingly obtained a rule *nisi* to increase the verdict.

Mr. Serjeant *Cross*, on a subsequent day, also obtained a rule *nisi*, on the part of the defendants, for a new trial, on the ground that there was no sufficient evidence of negligence to charge them with the loss of the bag. This rule was granted conditionally, to be argued in case the rule obtained by Mr. Serjeant *Wilde* should be made absolute. And now—

Mr. Serjeant *Cross* shewed cause against the last-mentioned rule.—The plaintiff was not the owner of the note. The parcel in which it was inclosed was entrusted to him

for the purpose of its being booked at the defendants' office at *Stockton*. Had he done this, the defendants would undoubtedly have been responsible for its safe conduct. But, as he took upon himself to convey it, the defendants clearly are not liable; particularly as the loss was rather attributable to the misconduct of the plaintiff, than to any negligence on the part of the defendants.

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Mr. Serjeant *Wilde*, in support of his rule.—In an action against a coach-proprietor for negligence, the defendant cannot question the title of the plaintiff—on the same principle that a tenant is not permitted to contest the title of the landlord under whom he holds. The plaintiff had at all events such a special property in the parcel as will entitle him to recover as against a wrong-doer. Besides, he would be liable for its value to *Garbut*, who could have no remedy against the defendants, he being no party to the contract with them.

Lord Chief Justice TINDAL.—I think the rule, for increasing the damages in this case ought to be discharged. In order to entitle him to recover, the plaintiff should have shewn that he had either the absolute, or a special limited property in the thing lost. That the plaintiff was not the owner of the 50*l.* note, is admitted. The question then is, whether he had it delivered to him on any bailment. As to this, the evidence was that the parcel containing the note was entrusted to the plaintiff by Mr. *Garbut*, to be booked at the defendants' office at *Stockton*. In breach of this bailment, however, the plaintiff thought proper to put the parcel with his own luggage. By this means, the owner was deprived of all remedy against the defendants for its loss; and the plaintiff was also a wrong-doer as regards the defendants, for he deprived them of the reward they would otherwise have been entitled to receive for the carriage of the parcel. Upon both grounds, there-

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fore, and more particularly upon the latter, I am of opinion that the plaintiff is not in a situation to maintain the action in respect of the note.

With this rule falls also the rule for a new trial conditionally obtained on the part of the defendants in case the should be made absolute.

Mr. Justice PARK.—In all probability the Jury, in assessing the damages at 15*l.*, proceeded upon the ground stated by my Lord Chief Justice. I agree with my brother *Wilde*, that it is not competent to a bailee to question the title of the party with whom he contracts. In the present case, however, it was the duty of the plaintiff only to carry the parcel from *Yarm* to *Stockton*. In breach of that duty, he put it with his own luggage. This was a breach of duty also towards the defendants; for, he thereby deprived them of the reward they would have been entitled to for the carriage of the parcel. I therefore concur in thinking that this rule ought to be discharged.

Mr. Justice GASBLEE concurred.

Mr. Justice BOSANQUET.—I agree that it is not competent to a carrier to dispute the title in the goods entrusted to him, of the party from whom he receives them. But, in the present case, I think the plaintiff has not conducted himself properly towards the defendants with regard to *Garbut's* parcel; and therefore that he is not entitled to charge them for its loss.

Rule discharged.

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Monday,
June 28th.

GOULD and Another, Assignees of SERJEANT, a Bankrupt, v. SHOYER.

THIS was an action of trover for a lease. The cause was tried before Mr. Justice *Bosanquet* at the last Assizes for *Taunton*. The facts were as follow:—

In the month of *June*, 1827, a commission was sued out against *Serjeant*, under which he was afterwards declared a bankrupt. Three persons were chosen assignees under this commission, who, on the 22nd *October*, 1827, put up to sale the lease in question, which was purchased by the defendant. In *May*, 1829, the commission that issued in *June*, 1827, was superseded; and another commission was subsequently sued out, under which the plaintiffs were appointed assignees.

The assignees of a bankrupt are not bound by a sale under a former superseded commission; but may recover back the property, although the purchase were strictly *bond fide*.

The question was, whether the purchase by the defendant under the former commission was protected by the 87th section of the statute 6 *Geo.* 4, c. 16, which enacts—“That no title to any real or personal estate sold under any commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or *any person claiming under him*, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same within twelve calendar months from the issuing thereof.”

The learned Judge thought that the above section did not apply to the assignees, inasmuch as they claim, not *under* the bankrupt, but adversely to him.

The Jury having returned a verdict for the plaintiffs—

Mr. Serjeant *Merewether*, in the last term, in pursuance of leave for that purpose, obtained a rule *nisi* to enter a nonsuit.—He submitted that the object of the Legislature

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in framing the clause in question was, to protect sales under commissions, to quiet possessions thereby acquired, and thus to encourage unrestrained purchase (*a*).

Mr. Serjeant *Wilde*, and Mr. Serjeant *Stephen*, on a former day in this term, shewed cause.—The 87th section of the statute 6 *Geo.* 4, c. 16, has no reference to a superseded commission; all its words are clearly referrible to an existing commission. The clause has for its object the preventing the bankrupt from impeaching any title derived under his assignees. The 78th, 92nd, and 94th sections will assist the construction of that now under consideration; these clauses are all directed to the same object—the quieting of the titles of persons purchasing the bankrupt's estate from the assignees, where the bankrupt does not within the prescribed time give notice of his intention to dispute the validity of the commission. The assignees do not claim through the bankrupt. In *Doe d. Goodbehere v. Bevan* (*b*), it was held that a proviso in a lease, that the lessee, his executors or administrators, should not assign without the lessor's consent in writing, does not prevent the commissioners from assigning the lease to the assignees without such consent (*c*)—the commission operating as a kind of statutory execution.

(*a*) The motion also embraced another ground of objection, *viz.* that the debt of the petitioning-creditor under the second commission was barred by the statute of limitations. This latter objection, however, was over-ruled by the Court.

(*b*) 3 *Mau. & Selw.* 153.

(*c*) The law affecting insolvent debtors differs in this respect from the bankrupt law. In *Shee v. Hale*, 13 *Ves.* 104, an annuity had been bequeathed by a man to his son,

conditioned to fall into the residue upon his signing any instrument, *to sell, assign, charge, or dispose of or empower any person to receive the annuity.* The son took the benefit of an insolvent-act, and inserted this annuity in his schedule. The question was, whether the annuity was to sink into the residue. It was compared to the case of bankruptcy; and it was said that this was *the act of the law*, and not of the party. But the Master of the Rolls (Sir *William Grant*) marked

Mr. Serjeant *Merewether*, in support of his rule.—Formerly, purchases under commissions were liable to be defeated by a *supersedeas*. The Lord Chancellor, however, would sometimes interpose, and refuse to grant a *supersedeas* where *boná fide* purchasers were in possession of any part of the bankrupt's property, by purchase under the commission, except on condition of the bankrupt's confirming their titles. The Legislature has now, by the 87th section of the late bankrupt-act, provided a remedy. The present case falls within that provision. To hold the contrary, would have a most injurious effect upon sales under bankruptcies: for purchasers at public sales can have no knowledge as to whether or not the proceedings under the commission have been regularly conducted.

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Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The only point upon which the Court entertained any doubt was that which was last urged on the part of the defendant, *viz.* whether the defendant, who had purchased the lease from the assignees of the bankrupt under a commission issued in 1827, which was afterwards superseded on the petition of a creditor, was protected under the 87th section of the 6 *Geo.* 4, c. 16, against the present action, brought to recover the same lease, by the assignees under a second commission.

The 87th section contains a provision entirely new to the bankrupt law. In order, therefore, to judge of the

the distinction, saying—"It appears to me that the son has done an act within this will to authorize or empower others to receive this annuity. *This differs from the case of the bankrupt. The bankrupt had not done anything.* The insolvent

debtor was not in a situation to be compelled to part with this annuity. He might have enjoyed it for his life. *The signing the petition and schedule appear to me to be clear acts.*"

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extent and operation of that section, it should be considered what were the mischiefs at that time experienced. By superseding a commission, any thing done under it was considered to be void whilst the writ of *supersedeas* remained in force; all titles to real property purchased from the assignees were defeated; all payments made to, and all acts done by them were held to be void. But, as no *supersedeas* could be obtained but by application to the Great Seal, it was in the discretion of the Chancellor to refuse to grant a *supersedeas*, either at the prayer of the bankrupt, or even with the consent of all the creditors, where *bond fide* purchasers were in possession of any part of the bankrupt's property, by purchase under the commission, unless the bankrupt elected to confirm the purchases under which they claimed.

No real or substantial injury could therefore be effected by a *supersedeas*; because notice of the application must be given to all parties concerned. The Lord Chancellor would hear all whose interests were affected. He would direct an issue where he felt doubt as to the propriety of the application; and would only grant the application upon terms which would insure the just rights of all.

But there was another mode in which the bankrupt might question the titles of others, without any application to the Lord Chancellor; and that was by bringing an action at law, and by proving, in the language of the 87th section, "a defect in the suing out of the commission, or in any of the proceedings under the same;" in which case *bond fide* purchasers might be deprived of their purchases, without any remedy whatever.

In order to prevent this mischief, and this only, as it appears to us, was the 87th section framed. The object of that section was, to take away the power of the bankrupt to question titles, unless where he commenced proceedings to supersede the commission, and duly prosecuted the same, within twelve months: thus, at once limiting the bankrupt to the period of a year within which he must ap-

ply for the *supersedeas*, and restraining him to that course in which it was well known that the Lord Chancellor would provide that he should not question the titles of those who were *bond fide* purchasers under the commission. The 87th section, therefore, appears, to us to have been passed for a purpose quite different from that of operating as a restraint on assignees under a second commission; and we think that it contains no provision to that effect. There can, therefore, be no reason for extending the words "claiming under the bankrupt," beyond the strict meaning, that is, persons claiming as purchasers, devisees, heirs, or personal representatives; the assignees not claiming, in strictness, *under* the bankrupt, but adversely to him, and by operation of law.

If the defendant had any just title to protection, he might have appeared before the Great Seal when the creditor obtained the *supersedeas* of the former commission, and no doubt he would have received protection from this action.

Rule discharged.



SIR EDWARD TRACEY, Bart., and Another *v.* The Bank of
ENGLAND.

Monday,
June 28th.

THIS was an action on the case brought against the Governor and Company of the Bank of *England*, for not transferring certain stock of the plaintiffs, which it appeared had previously been transferred under a forged power of attorney.

The declaration was as follows:—"That whereas before and at the time of the committing the grievance here-

The plaintiffs, being entitled to certain stock, which had been transferred in the books of the Bank of *England* under a forged power of attorney, entered into an engagement with the Bank, to

tender a proof of the value of the stock, as a debt upon the estate of the firm of which the person who committed the forgery was a member, in consideration of the Bank agreeing to replace the stock, and to pay the intermediate dividends:—*Held*, that, by this agreement, the plaintiffs' right of action against the Bank was suspended until they took the proceeding which they had bound themselves by such agreement to adopt.

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inafter mentioned, the said Sir *Edward*, and *Josias Henry*, as survivors of one *Hardinge Stracey*, deceased, and whom the said Sir *Edward*, and *Josias Henry* have survived, *were lawfully possessed* of a certain large sum, to wit, the sum of 605*l.* 11*s.* 2*d.* interest or share in the joint-stock of the annuity created by an Act of Parliament of the fourth year of the reign of his late Majesty, King *George* the Third, intituled, ‘ An act for charging on the sinking fund certain annuities granted by an act passed in the first year of the reign of his said Majesty, and for carrying the duties therein mentioned to the said fund; and also for consolidating such of the said annuities as are granted for a certain term of years irredeemable, with other annuities granted by an act passed in the second year of his said Majesty’s reign;’ and also by several subsequent acts of his said late Majesty’s reign, for raising further sums, and for consolidating the same with the said annuities transferrable at the Bank of *England*; which said stock, before the time of the committing of the grievance hereinafter mentioned, was standing in the public books of the said Governor and Company in the names of the said Sir *Edward* (therein described as *Edward Stracey*, of *Parliament Street*, Esq.), the said *Josias Henry* and the said *Hardinge Stracey* now deceased, and was in the care of the said Governor and Company for the purpose, amongst other things, of making and entering in the said books such transfer of the said stock as the said Sir *Edward* and *Josias Henry*, as such survivors as aforesaid, should authorize and require: By means whereof the said Governor and Company became liable, and it became and was their duty, to make and enter, and suffer and permit to be made and entered, in the books of the said Governor and Company, a transfer or transfers of the said stock, or any part thereof, whenever the said Sir *Edward* and *Josias Henry*, as such survivors as aforesaid, should authorize and require them so to do: And whereas also, at

the time of the committing the grievance hereinafter mentioned, the said stock remained in the care of the said Governor and Company, and no transfer of the said stock or any part thereof had then been made in the books of the said Governor and Company by the authority or at the request of the said Sir *Edward* and *Josias Henry*, and the said *Hardinge Stracey* deceased, or any or either of them: And whereas also, afterwards, and before the committing of the grievance hereinafter mentioned, and whilst the said Sir *Edward* and *Josias Henry*, as such survivors as aforesaid, were so possessed of and entitled to the said stock, to wit, on the 20th day of *May*, 1829, at &c. aforesaid, the said Sir *Edward* and *Josias Henry* contracted and agreed with a certain person, to wit, one *Ealand Alder*, for the sale and transfer to him of a certain part of the said stock so in the care of the said Governor and Company, to wit, for the sale of 302*l.* 15*s.* 7*d.*, part of the said stock; and the said *Ealand Alder* then and there agreed to purchase of the said Sir *Edward* and *Josias Henry* the said part of the said stock, for the sum of 5,885*l.* 5*s.* 4*d.*, to be paid to the said Sir *Edward* and *Josias Henry* at the time of the transfer of the said part of the said stock being made and entered in the books of the said Governor and Company: And whereas also the said Sir *Edward* and *Josias Henry*, as such survivors as aforesaid, afterwards, to wit, on the day and year last aforesaid, at &c. aforesaid, authorized and required the said Governor and Company to make and enter the transfer of the said part of the said stock to the said *Ealand Alder*, in the books of the said Governor and Company; and the said *Ealand Alder* was then and there ready and willing to accept and receive the said transfer, and to pay for the said part of the said stock according to the said contract, whereof the said Governor and Company then and there had notice: By means of which said several premises the said Governor and Company then and there became and

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were liable, and it then and there became and was the duty of the said Governor and Company, to make and enter the transfer of the said part of the said stock to the said *Ealand Alder* in their said book: Yet the said Governor and Company, well knowing the premises, but not regarding their said duty, but contriving and intending to deceive and defraud the said Sir *Edward* and *Josias Henry*, in this respect, did not nor would, when they were so authorized and requested as aforesaid, or at any other time, make and enter the said transfer of the said part of the said stock to the said *Ealand Alder* in their said books, but then and there wholly refused, and still do refuse so to do: By means and in consequence whereof the said Sir *Edward* and *Josias Henry* have been prevented from transferring to the said *Ealand Alder* the said part of the said stock, in completion of their said contract so made with him as aforesaid, and have lost and been deprived of the said sum of 5,885*l.* 5*s.* 4*d.* which the said *Ealand Alder* had agreed to pay to the said Sir *Edward* and *Josias Henry* at the time of the transfer of the said part of the said stock being made and entered in the books of the said Governor and Company; and the said Sir *Edward* and *Josias Henry*, in order to complete their said contract with the said *Ealand Alder*, have been forced and obliged to purchase, and have actually purchased, other stock at a much higher price than the said sum at which they had so sold the said part of their said stock to the said *Ealand Alder*, to wit, at the price of 5,923*l.* 2*s.* 3*d.*; and the said Sir *Edward* and *Josias Henry* have been and are, by means of the premises, put to great expense of their monies, to wit, to the expense of 100*l.*, and otherwise greatly injured and damnified, to wit, at &c. aforesaid."

The defendants pleaded the general issue. There was also a plea of the statute of limitations; but on that issue the Jury were by consent discharged.

Upon the trial, before the Lord Chief Justice, at the Sittings at *Guildhall*, after last *Hilary* Term, the Jury found a special verdict, in substance as follows:—

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“ That, on the 25th day of *October*, 1808, there was standing in the books of the Governor and Company of the Bank of *England*, in the names of Sir *Edward Stracey*, then *Edward Stracey*, and *Josias Henry Stracey*, jointly with one *Hardinge Stracey*, now deceased, the sum of 605*l.* 11*s.* 2*d.* interest or share in the joint-stock called Long Annuities, transferrable at the Bank of *England*, which sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities, belonged to Sir *Edward Stracey* and *Josias Henry Stracey*, and *Hardinge Stracey*, now deceased, as trustees under the will of *Hardinge Stracey*, Esq., the elder, deceased, and had been transferred to them by the executors under that will—That the accounts of the proprietors of the said stock called Long Annuities are kept in certain books of the Governor and Company of the Bank of *England*, called ledgers, and that accounts are entered in the form of debtor and creditor accounts in the said ledgers of the whole amount of the said stock called Long Annuities, in which accounts the sums either subscribed or transferred to individuals are stated as items to their credit on one side of the account, and on the other side of the account they are debited with all sums transferred from their names; and that certain other books are kept by the within-named Governor and Company of the Bank of *England*, in which are entered transfers of the said stock called Long Annuities, from time to time, purporting to be signed by the parties transferring the same, or their attorney lawfully authorized—That, upon the production of the transfer books, the clerks of the Governor and Company of the Bank of *England* who keep the ledgers, enter the sums transferred to the credit of the persons to whom the transfers

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are made in the ledgers, by adding those sums to their accounts, if they already have any, or by opening new accounts with such persons, if they have not already any accounts in such ledgers—That no entries in the ledgers are made without the authority of the entries which are made in the transfer books, but that, upon the production of such entries in the transfer books, the entries are made in the ledgers immediately, without further inquiry as to the genuineness thereof; and that any person on whose account any sum of stock appears in such ledger, is permitted at any time, on application to the Bank of *England*, to transfer the same, or any part thereof, at his discretion—That the within-named plaintiffs, at the time the said sum of 605*l.* 11*s.* 2*d.* Long Annuities stood in their names in the books of the Governor and Company of the Bank of *England*, well knew the course of business and mode of transferring the said stock. That the accounts are balanced twice a-year, for the purpose of making out dividends, and that the aggregate amount of the balance forms the aggregate of the said stock called Long Annuities; and that such aggregate amount is transmitted half-yearly to the Audit Office of the *Exchequer*, for the purpose of ascertaining the amount which will be wanted for dividends; and that the dividends are calculated on the balance so ascertained—That an account is also once a-year transmitted to the Audit Office of the *Exchequer*, which contains the names of all the proprietors; and that the dividends are paid twice a-year to the holders of dividend-warrants, which are made out from the ledgers in the names of the persons who appear by the ledgers to be entitled thereto—That the within-named *Josias Henry Stracey* received the dividends due in respect of the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities, in person, from the month of *October*, 1817, to the month of *April*, 1820, inclusive, and paid them from time to time to the house of *Marsh & Co.*,

bankers, in *Berners Street*, to the account of Mrs. *Stracey*, who had a life-interest in the said Long Annuities under the trusts created by the will of the said *Hardinge Stracey*, the elder—That, on the 23rd day of *June*, 1820, the said *Hardinge Stracey*, the younger, being then deceased, an entry was made in one of the transfer-books of the Governor and Company of the Bank of *England*, purporting to be a transfer under a power of attorney purporting to be granted to one *Henry Fauntleroy* by the said Sir *Edward Stracey*, then *Edward Stracey*, Esq., and *Josias Henry Stracey*, of an interest or share in the said stock called Long Annuities, which entry is as follows:—

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“ ‘ No. 4657.

“ ‘ Long Annuities for 80 years, consolidated from 5th *January*, 1780.

“ ‘ We, *Edward Stracey*, of *Parliament Street*, Esq., and *Josias Henry Stracey*, of *Berners Street*, Esq., survivors in a joint account with *Hardinge Stracey*, late of *Lincoln's Inn*, Esq., deceased, this 23rd day of *June*, 1820, do assign and transfer 605*l.* 11*s.* 2*d.*, all our joint interest or share in the joint-stock of the annuity created by an act of Parliament of the 4th year of the reign of his Majesty King *George* the Third, intituled ‘ An act for charging on the sinking fund certain annuities granted by an act passed in the first year of the reign of his said Majesty, and for carrying the duties therein mentioned to the said fund; and also for consolidating such of the said annuities as are granted for a certain term of years irredeemable, with other annuities granted by an act passed in the 22nd year of his said Majesty's reign, and also by several subsequent acts of his said Majesty's reign, for raising further sums, and for consolidating the same with the said annuities transferrable at the Bank of *England*,’ unto *Gilbert*

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Burrington, of the Stock Exchange, gentleman, his executors, administrators, or assigns. Witness our hands this 22nd June, 1820.

“ ‘ Witness,

W. Marsh. & Co. Attornies.

“ ‘ *Hy. Percivall.*

(Signed) *H. Fauntleroy*, Attorney to *Edward Stracey* and *Josias Henry Stracey*, survivors in a joint account with *Hardinge Stracey*.

£605. 11s. 2d.

“ ‘ I do freely and voluntarily accept the above interest or share transferred to me.

“ ‘ Witness.’

“ That the power of attorney under which the said entry was made, was not executed by Sir *Edward Stracey* and *Josias Henry Stracey*, or either of them, but that the signatures to the said power of attorney, purporting to be the signatures of the said Sir *Edward Stracey* and *Josias Henry Stracey*, were forged; and that the said *Henry Fauntleroy* had not any authority from them, or either of them, to make any such transfer; and that the said Sir *Edward Stracey* and *Josias Henry Stracey* did not nor did either of them ever authorize or request the Governor and Company of the Bank of *England* to make any transfer of the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities, or any part thereof, until the request and refusal hereinafter mentioned—That an entry was thereupon made in one of the ledgers of the Governor and Company of the Bank of *England*, by which Sir *Edward Stracey* and *Josias Henry Stracey* were debited with the said sum of 605*l.* 11*s.* 2*d.* Long Annuities, and credit was given to the said *Gilbert Burrington* for the said sum of 605*l.* 11*s.* 2*d.* in the said stock; and that, from that time, the said Sir *Edward Stracey* and *Josias Henry Stracey* ceased to have credit for any sum in the said stock called Long

Annuities in the said ledgers; and that, from that time, their account with the Governor and Company of the Bank of *England* was closed in the said ledgers; and that no dividends on the said stock were applied for or received by the said Sir *Edward Stracey* and *Josias Henry Stracey*, or either of them, in respect thereof, after the month of *April*, 1820, nor has any dividend-warrant on that identical sum of stock separate from other stock since been made out or paid—That, since the 23rd day of *June*, 1820, very numerous transfers of Long Annuities, of sums both great and small, have been made to and by the said *Gilbert Burrington*, which have been debited and credited to him, and that the said sum of 605*l.* 11*s.* 2*d.* Long Annuities has thereby become blended and mixed with other stocks standing in the said ledgers in the said *Gilbert Burrington's* name, and has been transferred and assigned by him; and that it is not possible to distinguish the account to the credit of which the said Long Annuities stand which were so carried to the credit of the said *Gilbert Burrington*, and debited to Sir *Edward Stracey* and *Josias Henry Stracey* as aforesaid—That Sir *Edward Stracey* and *Josias Henry Stracey* did not consent to, and had not any knowledge of, the above entry having been made in the month of *July*, 1820, in the transfer-book of the Governor and Company of the Bank of *England*—That *Josias Henry Stracey* was a partner in the said banking-house in *Berners Street* which carried on business under the firm of *Marsh & Co.*, and the business of which house the said *Henry Fauntleroy* chiefly managed—That *Marsh & Co.* kept an account with *Martin, Stone, & Co.*, bankers, in the city of *London*, in the usual way of a banker's account, and that a pass-book went from one house to the other, from time to time, according to the usual practice between bankers—That *Marsh & Co.* kept a book called a house-book, in which corresponding entries to those in the pass-book ought to have been made; and that, in the due course of business,

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the pass-book and the house-book of *Marsh & Co.* ought to have corresponded—That the house-book was in constant use in the banking-house of *Marsh & Co.*, and that the pass-book was frequently brought thither from the house of *Martin & Co.*; and, when it was at the banking-house of *Marsh & Co.*, that the said *Henry Fauntleroy* kept the same generally locked up in his own desk—That the said *Henry Fauntleroy* was permitted by the other partners to conduct the greater part of the business of the said banking-house, without their interference; that they were not men of business; that they had no knowledge of book-keeping; that they reposed great confidence in *Henry Fauntleroy*; and that the said *Henry Fauntleroy* made very many false entries and omissions in the house-book, so that the same did not correspond with the pass-book in many instances; that the said *Henry Fauntleroy* paid into the hands of *Martin & Co.*, and drew out of their hands, considerable sums which appear respectively in the pass-book, but not in the house-book, and also made very many other false entries in the other books of the firm, without the knowledge, and in fraud of his partners, to a large amount—That, on the 23rd *June*, 1820, the said *Henry Fauntleroy* ordered one *Thomas Butterfield Simpson*, a stock-broker, to sell out the sum of 605*l.* 11*s.* 2*d.* Long Annuities, described as standing in the books of the Governor and Company of the Bank of *England*, in the names of *Edward Stracey*, of *Parliament Street*, Esq., and *Josias Henry Stracey*, of *Berners Street*, Esq., survivors in a joint account with *Hardinge Stracey*, late of *Lincoln's Inn*, deceased; and that the said *Thomas Butterfield Simpson* sold the same to *Gilbert Burrington*, for the sum of 10,786*l.* 10*s.* 1*d.*, which sum he received from the said *Gilbert Burrington*; that, according to the course of business between the said *Thomas Butterfield Simpson* and the said *Marsh & Co.*, the said *Thomas Butterfield Simpson* allowed the said *Marsh*

& Co. one half of the usual commission when employed by them to effect sales, and upon the said sale he allowed one half of the commission; and that the said *Thomas Butterfield Simpson* paid the sum of 10,778*l.* 13*s.* 10*d.*, being the amount of the sum so received by him from the said *Gilbert Burrington*, deducting one half of the usual commission, by a check payable to the said *Henry Fauntleroy*, into the hands of Messrs. *Martin & Co.*, to the account of *Marsh & Co.*—That no entry was made at any time of the said sum of 10,778*l.* 13*s.* 10*d.* in the house-book, or any other books of *Marsh & Co.*, but only in the pass-book of the firm with *Martin & Co.*—That, on the 16th *September*, 1824, in consequence of the discovery of the forgeries of the said *Henry Fauntleroy*, *Marsh & Co.* became bankrupts—That, from the month of *April*, 1820, up to the date of the said bankruptcy, entries were made in the books of *Marsh & Co.*, by which Mrs. *Stracey's* account was credited with the amounts of the dividends on the said sum of 605*l.* 11*s.* 2*d.*, in the said stock called Long Annuities, as it had previously been, and as if those dividends had been regularly received from time to time; and that such entries were all made in the hand-writing of the said *Henry Fauntleroy*; and that, at the date of the said bankruptcy, there was a balance of between 600*l.* and 700*l.* in the books of *Marsh & Co.* in favour of Mrs. *Stracey*—That, after the bankruptcy, Sir *Edward Stracey* made application to the Governor and Company of the Bank of *England* respecting the said sum of 605*l.* 11*s.* 2*d.* interest or share in the said stock called Long Annuities, and that thereupon the following letter was written by the attornies of the Governor and Company of the Bank of *England* to the plaintiffs, and sent to the said Sir *Edward Stracey*—

“ ‘ *New Bank Buildings,*
 “ ‘ *4th December, 1824.*

“ ‘ Gentlemen,—The Governor and Directors of the

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Bank of *England* have had under their consideration your claim to have 605*l.* 11*s.* 2*d.* *per annum* Long Annuities, which formerly stood in your name, replaced. They find, upon inquiry, that the stock in question was sold and transferred in your names by one of the partners in the late firm of *Marsh, Stracey, & Co.*, and that the produce of the stock was paid into the funds of Messrs. *Marsh, Stracey, & Co.* You have, therefore, as the Bank is advised, a right to prove the amount received on your account, and to receive a dividend upon that proof, under Messrs. *Marsh, Stracey, & Co.*'s commission; and we are directed by the Governor and Directors to request that such proof may be tendered, and enforced by petition if it should not be admitted by the commissioners: after which the Bank will be ready to replace the amount of your stock so sold, upon having an assignment of your proof; and the dividends on the stock so replaced, which accrued subsequent to the latest period at which they were credited to you by Messrs. *Marsh, Stracey, & Co.*, will also be paid to you.

“ ‘ We beg to add, that we are ready to afford you information and assistance as to the evidence by which your right to prove will be established. We are, &c.

Freshfield & Kaye.’

“ ‘ *Edwd. Stracey, Esq.* and *Josias Henry Stracey, Esq.*, survivors of *Hardinge Stracey, Esq.*, deceased.’

and which letter, on the back thereof, was addressed as follows—‘ *Edward Stracey, Esq.*, and *Josias H. Stracey, Esq.* To the care of *Edward Stracey, Esq.*, *Great George Street.*’

“ That, on the 31st day of *May*, 1825, the Governor and Company of the Bank of *England* paid Sir *Edward Stracey* the sum of 605*l.* 11*s.* 2*d.*, on his signing and entering into the following receipt and agreement—

“ ‘ 31 *May*, 1825: Received of the Governor and Company of the Bank of *England*, the sum of 605*l.* 11*s.* 2*d.*, being the amount of payments which would have been made to me for the two half years, on the 10th *October* and 5th *April* last, on 605*l.* 11*s.* 2*d.* Long Annuities, if that stock had not been transferred, as I allege it to have been, without any legal authority from me.

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“ ‘ I say, received the same, without prejudice to my right to prove for the produce of the said stock under *Marsh & Co.*’s commission, or my right to claim to have the said stock replaced by the said Governor and Company. And I hereby engage, if the said debts shall be decided by a Court of law to be proveable, when required by the said Governor and Company, to tender a proof to the commissioners under the bankruptcy of *Marsh & Co.*, in respect of the produce of such stock sold out by them; and, in case such proof shall be rejected, to enforce the same by petition, at the expense of the said Governor and Company.

“ ‘ *E. Stracey*, and for *J. H. Stracey*,
 “ ‘ £605. 11*s.* 2*d.* “ ‘ Survivors of *Hardinge Stracey*.’

“ That, on or about the 16th *May*, 1829, Sir *Edward Stracey* and *Josias Henry Stracey* applied to the Governor and Company of the Bank of *England* to transfer a part of the said sum of 605*l.* 11*s.* 2*d.* Long Annuities; and that thereupon the attornies for the Governor and Company of the Bank of *England* wrote and sent to Sir *Edward Stracey* and *Josias Henry Stracey* a letter, whereof the following is a copy—

“ ‘ Gentlemen,—Having been informed by the officers of the Bank, that an application was made on your behalf to transfer 300*l.* odd, Long Annuities, from the names of Sir *Edward Stracey* and *Josias Henry Stracey*, survivors of *Hardinge Stracey*, we beg to suggest, that, before any

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application is made relative to the stock transferred in the year 1820, under an authority alleged to have been forged, you should tender to the Commissioners the proof engaged to be made by you on the estate of *Marsh & Co.* in respect of the proceeds of that stock. We are satisfied that it is equally important to all parties in this case, to reduce as much as possible the litigation necessary to an adjudication on the conflicting claims. We confidently expect that these must be disposed of before the vacation, if the measures now in progress are allowed to go on; but, if proceedings are adopted against the Bank, the delay and expense will be increased in a degree which it is serious to contemplate. We feel that the delay which has taken place must have been most irksome to all parties; and it has been, no doubt, purposely created by the agents of the assignees, with a view to exhaust the patience of the claimants. We should regret that they succeeded in this, when the transaction is so near a close; particularly as no means have been spared by the Bank to render the delay as little inconvenient as possible to the parties. If proceedings are adopted against the Bank, they will necessarily avail themselves of every defence within their power, though they will reluctantly enter such a contest.

“ ‘ We have the honour to be, &c.

“ ‘ *Freshfield & Son,*

“ ‘ *New Bank Buildings,*

“ ‘ 16 May, 1829.’

“ ‘ *Sir Edwd. Stracey, Bart. and*
 “ ‘ *Josias Henry Stracey, Esq.’*

“ That, on the 26th May, 1829, and after the death of Mrs. *Stracey*, Sir *Edward Stracey* and *Josias Henry Stracey* sold to one *Ealand Alder* the sum of 302*l.* 15*s.* 7*d.* of the said stock called Long Annuities, for the sum of 5,885*l.* 5*s.* 4*d.*, which they received from the said

Ealand Alder; that, on the same day, Sir *Edward Stracey* and *Josias Henry Stracey*, together with the said *Ealand Alder*, went to the Bank of *England*, and required the Governor and Company of the Bank of *England* to transfer into the name of the said *Ealand Alder* the said sum of 302*l.* 15*s.* 7*d.* of the said stock called Long Annuities, as and for part of the sum of 605*l.* 11*s.* 2*d.* Long Annuities, and the said *Ealand Alder* at the same time offered to accept the same; but that the Governor and Company of the Bank of *England* refused to make such transfer, and stated that there was not the sum of 302*l.* 15*s.* 7*d.* Long Annuities in the names of *Edward Stracey* and *Josias Henry Stracey*, survivors of *Hardinge Stracey*—That Sir *Edward Stracey* and *Josias Henry Stracey* afterwards bought and caused to be transferred to the said *Ealand Alder* a sum of 302*l.* 15*s.* 7*d.* in the said stock called Long Annuities, in pursuance of the said sale so made to him; for which sum Sir *Edward Stracey* and *Josias Henry Stracey* paid the sum of 5,923*l.* 2*s.* 3*d.*; and that Sir *Edward Stracey* and *Josias Henry Stracey* thereby sustained a loss of 37*l.* 16*s.* 11*d.*, being the difference between the said sums of 5,923*l.* 2*s.* 3*d.* and 5,885*l.* 5*s.* 4*d.*, together with the amount of the commission paid by them to their broker on the said transaction, amounting to 7*l.* 7*s.* That there was negligence on the part of *Josias Henry Stracey*, arising from want of knowledge of business.”

The damages were assessed at 45*l.* 3*s.* 11*d.*, viz. 37*l.* 16*s.* 11*d.*, the amount of the loss alleged by the plaintiffs to have been sustained by them on the resale of the stock, and 7*l.* 7*s.* paid by them for commission.

The case was argued in the last *Easter Term*.

Mr. Serjeant *Spankie*, for the plaintiffs.—There are two points for the consideration of the Court—*first*, whether, under the circumstances stated in the special verdict, the

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forged transfer can have the effect of dispossessing the original holders of their stock—*secondly*, whether the agreement entered into by the parties operates as a suspension of the plaintiffs' right to sue the defendants until they have taken the proceeding which they bound themselves by that agreement to take, *vis.* until they have made proof of their debt under the commission against Messrs *Marsh & Co.*

1. It is necessary in the first place to consider what is the nature of that property called stock, and particularly the description of stock called Long Annuities. The general definition given of stock by the Master of the Rolls, in the case of *Wildman v. Wildman*, is as follows (a): "The interest in stock is properly nothing but a right to receive a perpetual annuity, subject to redemption—a mere right, therefore: the circumstance that Government is the debtor makes no difference—a mere demand of the dividends as they become due; having no resemblance to a chattel moveable, or coined money, capable of possession and manual apprehension." *Bracton* says (b): "*Incorporales vero sunt sicut sunt jura, quæ videri non possunt nec tangi, ut jus eundi, agendi, aquamve ducendi, et hujusmodi, quæ non possidentur sed quasi.*" In *Justinian's Institutes* (c) also, incorporeal hereditaments are similarly described. So, in *Vinius* (d): "*Res omnes quæ tangi aut demonstrari non possunt, sed animo tantum cerni atque intelligi, incorporales quidem sunt.*" These authorities are decisive to shew the incorporeal nature of this property. *Blackstone* also ranges annuities under incorporeal hereditaments. He says (e): "An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out

(a) 9 Ves. 177.

(b) Lib. 1, c. 12.

(c) Lib. 2, tit. 2.

(d) Lib. 2, tit. 2, p. 204.

(e) 2 Bl. Com. 40.

of *lands*; whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor. Therefore, if a man by deed grant to another the sum of 20*l. per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity: which is of so little account in the law, that, if granted to an eleemosynary corporation, it is not within the statutes of mortmain." Lord Coke says (a), " '*Briefe de annuitie*' is a writ for the recovery of an annuity. An annuity is a yearly payment of a certain sum of money granted to another in fee, for life, or years, charging the person of the grantor only." By the statute 2 Geo. 3, c. 10, s. 15, the annuities granted by that act are declared to be personal estate. The 17th section prescribes the mode of transfer; and by the 18th section persons possessed of such annuities are enabled to devise the same by will. Stock is incapable of dispossession or disseisin. In *Blackstone's Commentaries* it is said (b): " Disseisin of incorporeal hereditaments cannot be an actual dispossession; for, the subject itself is neither capable of actual bodily possession, nor dispossession; but it depends on their respective natures and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at or enjoying them. With regard to freehold rent in particular, our antient law books mention five methods of working a disseisin thereof—1. By *enclosure*; where the tenant so encloseth the house or land that the lord cannot come to distrain thereon or demand it—2. By *forestaller*, or lying in wait; when the tenant besetteth the way with force and arms, or, by menaces of bodily hurt, affrights the lessor from coming—3. By *rescous*; that is, either by violently retaking a distress taken, or by preventing the lord with force and arms from taking any at all—4. By *replevin*; when the tenant replevies the distress at such time when his rent

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(a) Co. Litt. 144. b.

(b) 3 Bl. Com. 170.

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is really due—5. By *denial*; which is when the rent, being lawfully demanded, is not paid. All or any of these circumstances work a disseisin of rent; that is, they wrongfully put the owner out of the only possession of which the subject-matter is capable, *viz.* the receipt of it. And all these disseisins of hereditaments incorporeal are only so at the election and choice of the party injured; if, for the sake of more easily trying the right, he is pleased to suppose himself disseised. Otherwise, as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditament." *Littleton* says (a): "If one holdeth of me by rent-service, which is a service in gross, and not by reason of my manor, and another that hath no right claimeth the rent, and receives and taketh the same rent of my tenant by coercion of distress, or by other form, and disseiseth me by such taking of the rent; albeit such disseisor dieth so seised in taking of the rent, yet after his death I may well distrain the tenant for the rent which was behind before the decease of the disseisor, and also after his decease: and the cause is, for that such disseisor is not my disseisor but at my election and will." Upon that passage, Lord *Coke* says (b): "A man cannot be disseised of a rent-service in gross, rent-charge, or rent-seck, by attornment or payment of the rent to a stranger, but at his election; for, the rule of law is, *nemo redditum alterius invito domino percipere aut possidere potest*; and our author hath before taught us what he means by disseisins of rents-services, rents-charges, and rents-secks; and payment to a stranger is none of them; but at the lord's election, as our author here saith." From these authorities, it seems clear that a party cannot be disseised of these annuities. Being a thing incorporeal, it remains in contemplation of law as it was. The Bank of *England* may, as was said by Sir *Joseph Jekyll*, in the case of *Hildyard v. The South*

(a) Section 588.

(b) Co. Litt. 233. b.

Sea Company (a), be considered as the lord of a manor, who cannot by any tortious act affect the title of a copyholder. In *Watkins on Copyholds*, it is said (b): "There cannot properly be a disseisin of a copyholder, for the freehold is in the lord: if any one, therefore, enter 'with strong hand' into a copyhold, he does not usurp the seisin; nor, consequently, become a *tenant*." In *Zouch v. Forse*, Lord *Ellenborough* says (c): "An admittance to a copyhold does not in itself constitute a possession: it only gives the party the means of possession if he have a good title to it:" and Mr. Justice *Lawrence* and Mr. Justice *Le Blanc* asked—"If the lord admit one upon a mistaken claim, which turns out to have no foundation, how can that pass the estate to him?" So, here, the right of the holder of the stock cannot be displaced by the unauthorized act of the Bank: they cannot set up as a bar to the plaintiffs' remedy, a transfer made without their authority. Their right remains wholly untouched by such transfer. The earliest case to be found upon the subject is that of *Monk v. Graham* (d), where it was held, that, if an agent entrusted by a stock-holder to receive the yearly dividends, make a fraudulent sale of the stock by means of a pretended power of attorney, and transfer it by personating the proprietor, and abscond, the proprietor may recover the original price paid for the stock, in an action of trover against the vendee. The only peculiarity in that case is, that the Jury, thinking some blame to be imputable to the plaintiff, gave her less than the value of the stock; but no doubt was entertained as to her right to relief, and to be placed in her former situation. In *Hildyard v. The South Sea Company and Keate* (e), where certain *South Sea* stock had been transferred by virtue of a forged letter of attorney, the Master of the Rolls de-

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(a) 2 P. Wms. 77.

(b) 3rd Edit. p. 61.

(c) 7 East, 192.

(d) 8 Mod. 9.

(e) 2 P. Wms. 76.

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creed the transfer to be void, and directed the stock to be restored by the assignee to the original holder. Sir *Joseph Jekyll* there said: "When the defendant *Keate* bought by letter of attorney, it was incumbent upon him, and at his peril, to see that such letter of attorney was a true one; it was more his concern and in his power to inquire into the reality of this letter of attorney than of any other person, so that the rule of *caveat emptor* is in this case properly applicable to him. On the other side, it is plain, that, though the defendant *Keate* has been in fault, yet here can be no pretence of fault or negligence in the plaintiff *Hildyard*; and therefore it would be most apparently unjust to let him suffer: a forged letter of attorney was, as to him, the same as no letter of attorney; consequently his stock, which has been transferred from him without any authority at all, ought to be restored to him. Then, as to the Company, they were but instruments and conduit-pipes; or like the lord of a manor, in case of a surrender of a copyhold, where, if there should be a forged letter of attorney empowering one of the copyholders to surrender to the use of *J. S.*, and thereupon the attorney, in the name of the copyholder, should surrender to the use of *J. S.*, who should be accordingly admitted by the lord, yet this admittance would be void; and so is the transfer of this stock to the defendant *Keate*: and it would be of public use, that those who accept of a transfer of stock under a letter of attorney should be obliged to take strict care of the validity and reality of such letter of attorney, for no other person can be so properly concerned to do it." It did not occur to the Master of the Rolls in that case that the Company was liable. Subsequent cases have, however, determined that the Bank of *England*, or other company, making a transfer under a forged power of attorney, are the parties that are liable to make good the loss. In *Harrison v. Pryse* (a), *E. H.* pur-

(a) Barnard. Chan. Rep. 324; S. C. Vin. Abr. Vol. 20, p. 7.

chased 1,000*l.* *South Sea* stock, and accepted the same in the Company's books soon after his buying it. Afterwards, another of the same name, but known by another description, got by some means or other the 1,000*l.* stock belonging to the first *E. H.* placed to his account in the Company's books, and some years afterwards transferred the same to *R.*, his broker, in order to sell the same for him, which *R.* accordingly did. Both these persons respectively named *E. H.* died. On a bill brought by the representative of the first *E. H.*, the Court was of opinion that the representative might elect either to have this specific quantity of stock bought for her, or a satisfaction for it as it was at the time it was sold out, at which time a conversion was made of it; and likewise seemed to incline *that the Company might be liable in case the representative of the last E. H. had not sufficient assets*; because they must be considered as trustees for the first *E. H.* at the time he purchased the stock; and, as the same was transferred without his privity, they must be considered as continuing his trustees. In *Ashby v. Blackwell* (a), a joint-stock company having permitted a transfer of stock under a forged letter of attorney—it was held that the company, and not the fair purchaser, should bear the loss. The Lord Chancellor, in giving judgment, said: "The letter of attorney is no part of the title, but an authority to transfer. A trustee, whether a private person or body corporate, must see to the reality of the authority empowering them to dispose of the trust money; for, if the transfer is made without the authority of the owner, the act is a nullity, and, in consideration of law and equity, the rights remain as before." The case of *Davis v. The Bank of England* (b) is decisive of the question. It was there held that property in stock is not transferred from the owner by being placed, under a forged power of attorney, to the

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(a) 2 Eden's Rep. 299. (b) 2 Bing. 393; S. C. 9 J. B. Moore, 747.

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name of another person in the books of the Bank of *England*. The doctrines there laid down will be questioned on the other side; but the reversal of that judgment by the Court of *King's Bench*, in error, does not in the least affect the reasoning of Lord Chief Justice *Best*: the reversal proceeded on a ground wholly distinct from those argued in this Court. His Lordship there said: "I take it to be clear that a transfer in writing not made by the party transferring, or some agent duly authorized, can have no effect. A forged indorsement in a bill of exchange conveys no interest in such bill. Transferrable shares of the stock of any company cannot be divested out of the proprietors by any act of the company, without the authority of the stockholders. The Bank of *England* has no more authority to affect the interest of any stock-holder, than the most insignificant chartered company has to dispose of the shares of any of the members of such company. The Legislature, so far from allowing any act of the Bank to deprive the stock-holder of his interest, has taken care to direct in what manner the interest he has in the public annuities shall be conveyed away, and to declare that no other mode of conveyance shall be legal. In many, if not all the Loan acts, the mode of transferring stock is prescribed by the following words: 'There shall be kept in the office of the accomptant in *London*, books wherein transfers of stock shall be entered, which entries *shall be signed by the parties making such transfers*, or by their attornies authorized by writing under their hand and seal, and attested by two witnesses; and the persons to whom such transfers are made shall under-write their acceptance, *and no other method of transferring stock shall be good*.' The assignment of the stock-holder and the acceptance by the assignees complete the transfer. The Bank have no part in this transaction: they are only to see that it is properly registered in their books. In the present case, the assignment by the stock-holder is wanting, the persons who made the assignment having no authority from the stock-holder." The

Government, and not the Bank, is the debtor of the fundholder. The Bank are merely agents of Government to pay the dividends: and they cannot, by a forged power of attorney, deprive the owner of his stock.

2. The agreement entered into by the plaintiffs with the Bank, to tender a proof to the commissioners under the bankruptcy of *Marsh & Co.* in respect of the produce of the stock sold out under the forged power of attorney, does not operate as a bar to their right to have the stock replaced. There was no consideration for such an engagement. The mere conditional offer of the Bank does not amount to an accord and satisfaction. In *Comyns's Digest* (a), it is laid down, that, "an accord that makes a good plea, must be in full satisfaction of the thing demanded. And therefore, if the defendant plead an accord between him and the plaintiff, that, if he did his endeavour to reconcile the plaintiff and a stranger, then, &c., it is not good; for his endeavour is no satisfaction to the plaintiff. So, in an action upon the statute of *Richard 2*, for a forcible entry, if the defendant plead an accord, that the plaintiff should re-enter and have his charters re-delivered by the defendant, it is not good; for, the re-delivery to the plaintiff of his own charters is not any satisfaction for his precedent tortious entry. So, in trespass, if the defendant plead an accord, that the plaintiff should have his cattle again." So, here, the agreement was *nudum pactum*: the Bank offered no satisfaction. In *Peytoe's* case, it is said (b), that "every accord ought to be full, perfect, and complete; for, if divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed." *Reniger v. Fogossa* (c), *Oneley v. The Earl of Kent* (d), and *Allen v. Harris* (e). So, in *James v. David* (f),

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(a) Tit. "Accord," (B. 1.).

(b) 9 Rep. 79 b.

(c) Plowd. 5.

(d) Dyer, 355 b.

(e) Lutw. 1537; S. C. 1 Ld.

Raym. 122.

(f) 5 Term Rep. 141.

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a plea that the plaintiff and defendant agreed to settle all matters in dispute, and to bind themselves in a penalty not to sue each other, was held to be a bad plea. The case of *Longridge v. Dorville* (a) will be relied upon on the other side. There it was held that the giving up a suit instituted to try a question respecting which the law was doubtful, was a good consideration for a promise to pay a stipulated sum by way of damages. Here, however, there is no settlement of an adverse claim. The agreement is very far from embracing the whole rights of the parties. Besides, the Bank, as the agent of Government, had no right to impose such a condition upon a Government creditor. And even supposing the agreement to be binding upon the plaintiffs, it could only form the ground of a cross action.

The fact of the money produced by the sale of the stock in question coming into the funds of the banking-house of which one of the plaintiffs was a partner, will not charge the plaintiffs, as trustees. That money was the produce of the crime of one of the partners, to which the rest were no parties. The plaintiffs, therefore, have no claim against them. *Ex parte Apsey* (b), *Ex parte Hunter* (c), *Ex parte Heaton* (d), *Emly v. Lye* (e).

Mr. Serjeant *Taddy*, for the defendants, contended—*first*, that the declaration was ill conceived, inasmuch as it charged the Bank, not for negligence in improperly making the transfer under the forged power of attorney; but called upon them to transfer stock which was not in fact standing in their books—*secondly*, that the agreement entered into by Sir *Edward Stracey* with the Bank operated a suspension of the plaintiffs' right to sue until they had first taken

(a) 5 Barn. & Ald. 117.

(b) 3 Bro. Chan. Cas. 265.

(c) 1 Atk. 223.

(d) Buck's B. C. 386.

(e) 15 East, 7.

the steps which by the agreement they had bound themselves to adopt—*thirdly*, that *Josias Henry Stracey* having, as a partner in the house of *Marsh & Co.*, received the proceeds of the sale of the stock in question, the plaintiffs were precluded from bringing this action.

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1. The old authorities referred to in the argument on the part of the plaintiffs, can have no application to this question. Stocks were unknown in the times of *Justinian*, of *Vinnius*, and of *Bracton*. The language of the Master of the Rolls has been cited to shew that a party cannot be *dispossessed* of stock. Sir *William Grant*, however, goes further, and shews that there can be no *possession*: he says—"The interest in stock is properly nothing but a right to receive a perpetual annuity, subject to redemption: a mere right therefore. The circumstance that Government is the debtor makes no difference: a mere demand of the dividends as they become due; having no resemblance to a chattel moveable, or coined money, capable of possession and manual apprehension." The passage cited from Lord *Coke* (a) does not prove that an annuity is necessarily real property; but merely, that, for the purpose of the remedy, the party shall have a writ of annuity, which is in form a real action. This stock is made personalty by the statutes creating it; it is not a thing that might be recovered by a writ of annuity. *Blackstone* says (b) "Disseisin of incorporeal hereditaments cannot be an actual dispossession; for, the subject itself is neither capable of actual bodily possession nor dispossession; but it depends on their respective natures and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at or enjoying them." The cases cited on the other side have no similarity to the subject-matter of this action. The analogy suggested by Sir *Joseph Jessell*, in *Hildyard v. The South Sea Company*, is altogether

(a) Co. Litt. 144. b.

(b) 3 Bl. Com. 170.

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stock-holder of his interest) has taken care to direct in what manner the interest he has in the public annuities shall be conveyed away, and to declare that no other mode of conveyance shall be legal. Under the early Loan acts, tallies were delivered to the first contractors; and they were authorized to transfer their interest by indorsement on their tallies, which indorsements were directed to be registered in the books of the Bank. The entry of these indorsements in the Bank books was only to inform the Government who were the persons to whom the dividends were payable; the right of these persons to the dividends depending entirely on the indorsement on the tally. With this indorsement the Bank had no more to do than they have with the indorsement on any bill which they have accepted; and yet they were as much bound to pay the dividends according to the indorsement on the tally, as they are to pay their acceptance according to the indorsement on the bill accepted. These tallies are not now used; but the shares of the loan contractors and their assignees are registered in books kept at the Bank. In many, if not all the Loan acts, the mode of transferring stock is prescribed by the following words—‘There shall be kept in the office of the accomptant in *London*, books wherein transfers of stock shall be entered, which entries shall be signed *by the parties making such transfers*, or by their attornies authorized by writing under their hands and seals, and attested by two witnesses; and the persons to whom such transfers are made shall under-write their acceptance: *and no other method of transferring stock shall be good (a).*’ The assignment by the stock-holder, and the acceptance by the assignees, complete the transfer. The Bank take no part in this transaction: they are only to see that the transfer is properly registered in their books. In the present case,

(a) See the statutes 1 Geo. 1, stat. 2, c. 19, s. 11; 12 Geo. 1, c. 2, s. 23.

the assignment by the stock-holder is wanting, the persons who made the assignment having no authority from the stock-holder." The nature of the stock in question was not pointed out to the Court in that case. It seems to have been assumed that there was some identical stock that could be handed over from one to another. His Lordship further says (a)—"We are not called on to decide whether those who purchase the stocks transferred to them under the forged powers, might require the Bank to confirm that purchase to them, and to pay them the dividends on such stocks; or whether their neglect to inquire into the authenticity of the powers of attorney might not throw on them the loss that has been occasioned by the forgeries. But, to prevent, as far as we can, the alarm which an argument urged on behalf of the Bank is likely to excite, we will say that the Bank cannot refuse to pay the dividends to subsequent purchasers of these stocks." How, then, can the prior holders be said to be in possession of the stock; the only mode of possession being the right to the perception of the dividends? If any negligence could be charged upon the Bank, they might be liable in another form of action: but here the action proceeds upon the very ground that the plaintiffs are still in actual possession of the stock transferred. Lord Chief Justice *Best*, in the case above cited, seems to consider the case of *Harrison v. Pryse*, as reported by *Barnardiston*, to be of no authority: he says—"In the report of that case it seems to be assumed that the stock had passed out of the name of the owner by the transfer under a fraudulent assumption of his name, although he never assented to such transfer. But whether it had so passed or not was not considered; and I therefore cannot think that case as an authority against our opinion, if it were correctly reported. I think, however, that it is not correctly reported by *Barnardiston*, for the

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(a) 9 J. B. Moore, 773.

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same case is to found by the name of *Harrison v. Harrison* (a). In this report, it appears that the stock was transferred by a trustee; and if so, the question whether a transfer unauthorized by the stock-holder would alter the property in the stock, could not arise, the trustee having a legal authority to transfer, although he might be guilty of a breach of trust by exercising that authority."

2. As to the contract entered into by Sir *Edward Stracey* with the Bank.

The case of *Stone v. Marsh* (b) decided that the proof which Sir *Edward* had engaged to make under the commission against *Marsh & Co.* might be made. By this agreement, Sir *Edward Stracey* has precluded himself from maintaining this action; he has waived his right until he makes the required proof. In *Longridge v. Dorville* (c), the abandoning a suit instituted to try a question in respect of which the law was doubtful, was held to be a good consideration for a promise to pay a stipulated sum. The circumstances of that case were these:—A ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damages; and the former vessel was detained until bail was given; and, pending such proceedings, the agents of the owners of the vessel detained, agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and, on their proving the amount of the damages sustained, to indemnify them, and to pay a stipulated sum by way of damages. The Court held, that, there being contradictory decisions as to the point whether ship-owners were liable for an injury done while their ship was under the control of a pilot required by law, there was a sufficient consideration to sustain the promise made by the

(a) 2 Atk. 121.

8 Dow. & Ryl. 71.

(b) 6 Barn. & Cress. 551; S. C.

(c) 5 Barn & Ald. 117

agents of the owners of the detained vessel to pay the stipulated damages. An agreement to stay an uncertain litigation is perhaps the best of all considerations. Was not the question in the present case one of considerable doubt? Was it not an object to Sir *Edward Stracey* to get rid of all litigation on the subject? In *Tatlock v. Smith* (a), the defendants entered into an agreement with their creditors, that trustees should be appointed for the purpose of settling their affairs, by the collection, sale, and division of their estate and effects equally among their creditors, who agreed that the trustees should take a conveyance and assignment of the defendants' estate and effects, and manage their affairs until each creditor should have received full payment of his debt, the surplus to be paid over to the defendants; and the defendants agreed to make a conveyance and assignment of all their estate to the trustees whenever thereunto required—the deed to contain all usual and necessary clauses. The trustees accordingly took possession of the defendants' effects, and paid each creditor ten shillings in the pound. A deed of conveyance was prepared, which the defendants were required to execute, but they refused to do so, the deed not containing a clause of release. At the time the deed was tendered for execution, one of the defendants only was present, and the meeting at which it was produced was adjourned, for the purpose of procuring the assent of the other defendant. The plaintiffs (creditors) signed the deed, and received ten shillings in the pound upon the amount of their debt, and afterwards sued the defendants for the residue. The Court held the action to be premature, inasmuch as the parties, by entering into the agreement, contemplated a suspension of the rights of the creditors to sue. Lord Chief Justice *Tindal* there said (b): “The ground on which I directed the plaintiffs to be nonsuited was, that they were

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(a) 3 Moore & P. 676; S. C. 6 Bing. 339. (b) 3 Moore & P. 686.

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not in a situation to bring this action after the agreement they had entered into, unless they could shew that it was no longer in force, or that it had been broken by the defendants. But there was a total absence of proof of either of these facts. The parties, by entering into the agreement, contemplated a suspension of the plaintiffs' right to sue as creditors, whilst the agreement was in operation." So, here, there was an agreement which operated a suspension of the plaintiffs' right to sue. The agreement on their part to tender the required proof under the commission against *Marsh & Co.*, was in the nature of a condition precedent to the maintenance of this action. It was contrary to good faith on the part of the plaintiffs, to commence the action before they had done that which they had bound themselves to do.

3. The money produced by the sale of the stock in question was paid into the banking-house of *Marsh & Co.* The plaintiff *Josias Henry Stracey* was a member of that firm. The question therefore is, whether a party entitled to certain stock which has been improperly sold out, and the produce of which has found its way into the funds of a house in which that individual is a partner, can in a Court of law bring an action against the Bank for the act that has put into the possession of his firm the very money for which he sues. This question was removed from the consideration of the Court in the case of *Stone v. Marsh*; for Lord *Tenterden* said (a): "The defendants in this case are by the order of the Lord Chancellor prevented from taking any objection on account of the particular situation of *Henry Fauntleroy*, as being both a proprietor of the stock sold and a partner in the banking-house; and the case is therefore to be considered as a case between the plaintiffs, proprietors of Navy 5 *per cent.* Annuities, on the one part, and the defendants, as a banking-house, on the

(a) 6 Barn. & Cress. 561.

other part." And his Lordship further said (a)—"It was contended that the maxim of ratifying a previous unauthorized act, and taking the benefit of it, cannot apply to a void or to a felonious act; and that here the plaintiffs were seeking to ratify the felonious act of *Henry Fauntleroy*, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendants' argument. The assertion is incorrect in fact; the plaintiffs do not seek to ratify the felonious act; they do not make that act the ground of their demand. The ground of their demand is the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer, nor the receipt of the money. The felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of *England* to allow the transfer to be made. If public policy had required that the felonious inducement should prevent a claim to the money afterwards received, as it would do if an action were brought against the felon for the money received by a transfer obtained by his felony, in lieu of a prosecution for the felony, a defence of another kind would be given. But that is not the present case, and, not being so, we think the plaintiffs may entirely pass by the felony, and rely on the transfer and receipt of the money; and that the defendants cannot protect themselves against the demand for the money which they have received, by shewing this felony on the part of one of the members of their house." It is clear, therefore, that the plaintiffs are concluded by the fact of the money produced by the sale of the stock in question having been received into a house of which one of the plaintiffs was a partner. Notice to one partner has always been held to be notice to the firm; and a payment to one is also payment to the house. The fact of *J. H. Stracey*

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being a trustee of the property makes no difference in the case.

Mr. Serjeant *Spankie*, in reply.—The *gravamen* of the charge contained in the declaration is, that it was the duty of the Governor and Company of the Bank of *England* to make and enter, and suffer and permit to be made and entered in their books, a transfer or transfers of the stock in question, whenever the plaintiffs should authorize and require them so to do; but that they refused to do so. Upon the fair construction of the statutes, they were bound to make the transfer. The plaintiffs had all the possession of which the stock is capable; being an incorporeal thing, it is incapable of manual possession, but the right to it is a possession imposed by the law.

The plaintiffs having an undeniable claim to the stock, the Bank had no right to impose upon them the conditions contained in the agreement: there was no consideration for such an abandonment of their immediate remedy.

It cannot be contended that the money paid into the house of *Marsh & Co.* ever was the money of the Bank. It was the money of the party who was seduced to buy the stock.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The declaration in this case is framed in accordance with the judgment of this Court given in the case of *Davis v. The Bank of England*, in which case it was held that the owner of property in the funds still remained the legal holder of the stock, notwithstanding it had been transferred to another name under a forged power of attorney. Accordingly, this declaration states that the stock had been standing in the names of the plaintiffs in the books of the Governor and Company of the Bank of

England, and that no transfer of the stock had been made; and alleges, as a breach of duty on the part of the Bank, their refusal to make and enter in their book a transfer of the plaintiffs to a purchaser of part of the stock. One question, and that which has been principally argued at the bar, turns upon the rule of law laid down by this Court in the case above referred to, and involves in fact a rehearing of that case. It becomes unnecessary, however, for this Court, upon the present occasion, to give any opinion upon the law so declared by the Court; indeed, as the question is raised upon the record, it is more satisfactory that a decision, in which two of my learned brothers now sitting with me concurred, should be made the subject of review in another Court, where, in case it becomes necessary, that question may be discussed upon a writ of error. But it becomes unnecessary on the present occasion to review that judgment, because (with the exception of my brother *Bosanquet*, who was engaged in the cause, and who has therefore taken no part in the discussion,) we all think our judgment ought to be given for the defendants upon another point which has been presented for the consideration of the Court: for, it appears to us that the plaintiffs have, before the commencement of this action, entered into an agreement with the defendants, upon good consideration, under which agreement their right of action is suspended, until they take the proceeding which they had bound themselves by such agreement to adopt.

It appears, upon the special verdict, that, long before the commencement of the action, the plaintiffs had applied to the defendants respecting the stock in question; and that, upon the 4th *December*, 1824, the solicitors of the Bank wrote a letter to the plaintiffs, stating, in substance, that, if they would prove the amount of their demand against the estate of Messrs. *Marsh, Stracey, & Co.*, and make an assignment of their proof, the Bank would replace

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the amount of the stock so sold. It was at that time a question of great nicety and difficulty, whether the Bank was by law liable to make good this loss: so that an engagement of the Bank to replace the stock without any litigation on their part, was of itself a very valuable and important concession, and a sufficient consideration to support a promise by the plaintiffs that they would tender, and endeavour to enforce, their proof against the bankrupts' estate. But it appears further that both parties proceeded to act upon the faith of this agreement; and that, on the 31st of *May* following, the Bank paid to the plaintiffs one year's annuity of this stock, *viz.* 605*l.* 1*l.* 2*d.*, taking a receipt from the plaintiffs, in which receipt the plaintiffs expressly engage, if the debts shall be decided by a Court of law to be proveable, to tender a proof to the commissioners when required by the Governor and Company of the Bank of *England*.

The substance of this contract appears to us to be, that the Bank, on the one hand, agree to replace the stock, and to pay the intermediate dividends; and the plaintiffs, on the other hand, agree, in the first instance, and before they claim the stock adversely, to tender a proof of their debt: and this agreement having been acted upon by the plaintiffs, so far as to receive one of the annual payments due upon this stock, and the plaintiffs, although requested thereto, having refused to tender the proof, we think it would be against good faith to allow this action to be maintainable, until the plaintiffs have performed their part of the stipulation.

It is urged by the plaintiffs, that, if this is an agreement on their part, it may be the ground of an action by the Bank to recover damages, but that it is no bar to the present action. The agreement, however, is not set up as a perpetual bar; it is merely insisted on as an objection to the action being brought at the present time; it is urged as an agreement by which the plaintiffs have, for a good

consideration, restrained themselves from suing, not perpetually, but only until they have first done a particular act. And it is not immaterial to observe, that the very circumstance of bringing this action, if the plaintiffs were to succeed in it, would have the effect of making it impracticable for them to keep their agreement so entered into with the defendants; for, the plaintiffs cannot recover in this action, except by establishing that they are still holders of the stock which has been sold; and, if they continue such holders, they cannot make proof of any debt under the commission.

Under these circumstances, we think the defendants, in order to avoid circuity of action, may avail themselves of this agreement as a suspension of the plaintiffs' right to sue in the present action, and that they are not confined to a remedy by a cross action thereon. The case of *Longridge v. Dorville* appears to us strongly in favour of the validity of such an agreement. As this point seems to us to be in favour of the defendants, it becomes unnecessary to consider the third question raised by the special verdict; and we, therefore, upon the second ground which was urged in argument, give judgment in this case for the defendants.

Judgment for the defendants.

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Certain persons met for the purpose of forming a joint-stock company. Directors were appointed, and advertisements and a prospectus were issued, describing the company as having a capital of 600,000*l.*, divided into 12000 shares of 50*l.* each, and stating that the concerns of the company were to be regulated by a deed of settlement and an act of Parliament; and that all persons who did not execute the deed within thirty days after it was ready, were to forfeit all share and interest in the concern. No act of Parliament was ever applied for. About 7500 shares, in all, were allotted. One third of the shareholders only paid the first deposit on their shares; one sixth paid the second; and only sixty-five signed the deed (amongst whom was *one* of the defendants). A book containing the names of the shareholders (those of the defendants among the rest), was prepared by the secretary, and shewn by him to the plaintiffs, as an inducement to them to trust the company; but it did not appear that this was done with the knowledge or assent of the defendants. A further advertisement was afterwards issued by the directors, declaring the shares of those who had neglected to pay the instalments to be forfeited:—*Held*, that the mere circumstance of applying for shares, and paying the deposit thereon, did not constitute the defendants partners in the concern, they not having signed the deed, or done any other act to identify themselves with the company; and that the fact of their names appearing (without their knowledge or assent) in the book shewn to the plaintiffs was not a holding of themselves out to the world as partners, so as to render them liable for the debts of the company.

WILLIAM and HENRY Fox v. CLIFTON, FENNELL, GREEN, HARTLEY, LEVI, WICKEY, LAWSON and PLUMMER.

THIS was an action of *assumpsit*, brought by the plaintiffs, who were engineers and mill-wrights, to recover a sum of 2,337*l.* 0*s.* 1*d.* for articles supplied to, and work done for, the Imperial Distillery Company, in which the defendants were alleged to be shareholders.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after *Trinity* Term, 1829. The facts adduced in evidence were as follow:—

Early in the month of *March*, 1825, certain persons met together at the *London* Tavern, and determined that a company should be formed for the distillation of spirits, to be called the “Imperial Distillery Company,” the capital of which should consist of 600,000*l.*, to be raised by twelve thousand shares of 50*l.* each. In conformity with these resolutions, an advertisement appeared in the *Times* and other daily papers, as follows:—

“*London*, 5th *March*, 1825.

“Imperial Distillery Company.

Capital 600,000*l.*, in 12000 shares of 50*l.* each.

“Although the parliamentary returns indicate the vast quantity of *British* spirits consumed in the metropolis and its neighbourhood; yet the public are not generally aware that six distillery houses enjoy the monopoly of the whole supply, and continue to fix the price under which the rectifiers, who are a numerous and respectable body, dare not sell them, on pain of being refused a supply of the raw

material. In consequence of such combination, spirits are sold to the victualler at so high a price that he is not enabled to retail them genuine at the accustomed rate attended with a fair profit to himself: he is then compelled to diminish their strength, by an admixture of unwholesome ingredients, to the injury of the public, and loss to the revenue. The object of this company is, to interpose between the public and the monopolist, by creating that honorable competition which the interests of the trade and the community so loudly demand, eventually to enable the rectifier and victuallers to vend spirituous liquors of a superior quality and at a reduced price. It is evident that this interposition against a monopoly so large and so overwhelming, and which has long existed to the exclusive advantage of a few wealthy and powerful individuals, cannot be adequately effected except by the establishment of a joint-stock company. The capital proposed is estimated to be fully equal to this important object, and more than sufficient for carrying on the business of the Imperial Distillery Company with energy, power, and success. The affairs of the company will be under the management of a board of directors and other officers. Applications for shares to be addressed to Messrs. *Fisher & Norcutt*, Solicitors, 10 *Holborn Court*, *Gray's Inn*."

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This advertisement was repeated on the 7th and 12th *March*; and on the 23rd a further, advertisement appeared, as follows:—

“ Imperial Distillery Company.

“ Capital 600,000*l.*, in 12000 shares of 50*l.* each.

[Then followed a list of the trustees, directors, auditors, bankers, counsel, solicitors, engineer and secretary of the company.]

“ The distilling and rectifying of spirituous liquors being frequently confounded by the public as synonymous branches of trade, and understood by few comparatively in their

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respective bearings, it is deemed expedient to premise that distillation, considered as a trade, is the production or manufacture of raw spirit from grain, sugar, or some other material; and that the art of rectifying is, to cleanse and purify such spirit from the superfluous oil peculiar to the ingredients from which it is extracted, and to render it fit for use. In short, the distiller makes the raw spirit, which, after being transmitted to the rectifier, and by him subjected to a certain process peculiar to that branch of the trade, is then of a proper strength, and, as it regards purity and wholesomeness, in a fit state for consumption.

“ Although the parliamentary returns indicate the vast quantity of *British* spirits consumed in *England*, yet the public are not generally aware that ten distillery houses at the present moment monopolize the whole trade. Indeed, the law, as it now stands, compelling distillers to employ vats containing at least three thousand gallons, does in fact prohibit all but large capitalists from engaging in the trade; and of course a greater field is open to combination and monopoly than would otherwise exist. Accordingly, the evils which might naturally be expected to arise, have long been and still continue in full and baneful operation.

“ Dependent on the distillers for a supply of raw spirits is a numerous body of rectifiers, who are expressly prohibited by act of Parliament from conducting on the same premises the trade of distillers and rectifiers, should they even possess the necessary capital; but, in several instances, the great distillers have themselves become rectifiers, having their distilleries in one quarter of *London*, or its neighbourhood, and their rectifying premises in another part. On these rectifiers the licensed victuallers in their turn solely depend, and thus a chain is formed of distillers, rectifiers, and retailers, through whom the public are supplied with an article of great importance and immense annual consumption.

“ It is notorious that the great distillers combine to fix the price of *British* spirits, under which the rectifiers dare

not sell them; for, so great is the subjection under which they are held, that, if they act contrary to the mandate of the distillers, the latter refuse to supply them with the raw material, by which their business is completely put an end to, and consequently, in common with the rectifiers, the spirit dealers and victuallers, having neither redress nor appeal from the *fiat* of the associated monopolists, all who are interested in the sale of rectified spirits feel most severely the consequences of the distillery trade being confined among so few individuals.

“ In consequence of the high price at which spirits are sold to the victualler, it is well known that he is not enabled to retail them genuine at the accustomed rate attended with a fair profit to himself: he is therefore compelled to diminish their strength, not unfrequently by an admixture of unwholesome ingredients, to the injury of the public and loss of the revenue.

“ The leading object of the Imperial Distillery Company is, therefore, to interpose between the public and the monopolist: to open a market for the regular supply of raw spirits to the rectifiers; and to create that honorable competition which the interests of the trade and of the community so loudly demand.

“ It is evident that this interposition against a monopoly so large and so overwhelming, and which has long existed to the exclusive advantage of a few wealthy and powerful individuals, cannot be adequately effected, except by the establishment of a joint-stock company. The capital required will, it is estimated, be fully equal to this important object, and more than sufficient for carrying on the distillery trade with energy, power, and success.

“ The Imperial Distillery Company, by dividing the trade with these great capitalists, and by rescuing the rectifiers from the existing combination and oppression of the distillers, will at the same time enable the public to procure a better and cheaper liquor, and essentially benefit

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the revenue, by putting it more out of the power of the illicit trader to come into the market on equal terms with the honorable and industrious rectifiers; for, the affairs of the company will be conducted on those enlightened, liberal, and economical principles, which will consult the interests of society as the surest guarantee of its own permanence and prosperity.

“ The affairs of the company are under the management of a board of directors. The capital is 600,000*l.*, in twelve thousand shares of 50*l.* each. *A deed of settlement will be prepared forthwith, which must be executed within thirty days after the same shall be ready for that purpose; and every person who shall neglect to execute the same within that time will forfeit all share and interest in the company.* The deed is to contain all such clauses and conditions as the standing counsel and solicitors of the company shall deem necessary for carrying on the business of the company, and for enforcing the observance and performance of the several rules and regulations to be contained therein, or in any bye-law that shall be from time to time made by the directors. Application is intended to be made to Parliament, for an Act to enable the company to sue and be sued in the name of one of its officers. And which said deed of settlement, when settled and approved of by the standing counsel and solicitors, and the Act of Parliament, when passed, shall be the deed of settlement and Act of Parliament for managing the affairs of this company.

“ The shares will be forthwith allotted, and, until offices are taken, all communications are requested to be made to the directors, at the *City of London Tavern*.

“ *William Lane, Secretary.*”

Between the date of the last-mentioned advertisement and the 9th *April*, the following prospectus was printed and circulated by the directors:—

“ Imperial Distillery Company.

Capital 600,000*l.*, in 12000 shares of 50*l.* each.

[Then followed a list of trustees, directors, auditors, bankers, counsel, solicitors, distiller, engineer and secretary.]

“ This company is established for the purpose of distilling spirits from malt, corn, &c., and of supplying the *English* market therewith upon liberal and advantageous terms. The present capital is 600,000*l.*, in twelve thousand shares of 50*l.* each, which has been ascertained, from authentic sources, to be more than sufficient to enable the company to erect buildings, and conduct the distillery business on an extensive scale. A power is, however, given to the directors to extend the capital, if the interests of the company should require it, by and with the approbation of the proprietors, expressed by a majority of votes at a special meeting convened for that purpose.

“ Relying for public support upon fair charges and the production of a superior article, every precaution has been adopted to engage such a combination of scientific and practical talent, for constructing the requisite works upon the most improved and economical principles, and for superintending the management of the various departments connected with the distillery business, as cannot fail to insure the company the most complete success.

“ Being perfectly unconnected with and independent of any other establishment of a similar nature, the public will be materially benefited by the competition which this company will create in the spirit trade, not only by occasioning an improvement in the quality of *British* spirits, but likewise by operating as a check against their being sold for more than a fair and reasonable price; and whilst the community at large will experience these advantages, the shareholders will receive an ample return for the capital embarked.

“ The wealth and prosperity of the few individuals en-

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gaged in *English* distillation is a subject of too great notoriety to admit of any doubt that great profits are derived from it: independent of which, the information collected by the directors from persons connected with the trade, and from other unquestionable authorities, has satisfied them that a very considerable annual income must be derived from the employment of capital in an extensive concern of this nature.

“ By improving the quality of *British* spirits, and carrying on business upon fair and honorable terms, unfettered by the restrictions which have long held the vendors of *British* spirits in subjection to the distillers, this company will protect the revenue from fraud, by putting it more out of the power of illicit traders to compete with those who deal in spirits which have paid the duty; and thus, whilst much political good will be accomplished in the discouragement of smuggling, it is obvious that great advantages will be secured both to dealers and consumers, by the opening of a free trade, and the production of a pure and wholesome spirit.

“ The affairs of the company are under the control of a board of twelve directors, and other officers.

“ The best exertions of the directors are applied to the arrangement of the measures necessary for carrying into effect the important objects of the company without delay; and, as they have already nearly concluded the purchase of a plot of ground in every respect suitable for the purposes of a distillery, they confidently calculate upon completing the buildings and apparatus for the commencement of work at an early period.

“ It is the unanimous determination of the directors to observe the most rigid economy consistent with the interests of the company. By pursuing a steady and uniform course of judicious management, in the employment of skilful persons, in the adoption of energetic measures whenever occasion shall require, and in a just and faithful ap-

plication of the funds entrusted to them, they anticipate with much confidence that a comparatively short period will enable them to give to the proprietors the most satisfactory proofs that their capital is invested in a secure and lucrative undertaking.

“ The directors have much satisfaction in announcing to the public, that they have already secured the services of a gentleman whose knowledge of distillation has stood the test of twenty-four years’ practical experience, in a concern which has been raised by his talents and exertions to considerable eminence in the trade. The proprietors may therefore congratulate themselves, that, in the appointment of Mr. *Baird* as the distiller, the directors have entrusted the important and arduous duties of that office to a gentleman in every respect qualified for the situation.

“ The first deposit will be 5*l.* on each share, and the remainder will be called for at such intervals as the interests of the company may require; but no call is to exceed 5*l.* at any one time. No transfer of shares shall be made by a proprietor until all instalments previously called for have been paid upon his shares, and the purchaser shall have been approved of by a majority of the directors. On such transfer being made, the purchaser shall execute a covenant for the due observance of the regulations of the company.

“ A deed of settlement will be prepared forthwith, which must be executed within thirty days after the same shall be notified in the *London Gazette* as being ready for that purpose; and every shareholder neglecting to execute the same within that time, will subject his shares to forfeiture by the directors. The deed will contain all such clauses and conditions as the standing counsel and solicitors to the company shall deem necessary for carrying on the business of the company, and for enforcing the observance and performance of the several rules and regulations to be contained therein, or in any bye-laws which shall from time to

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time be made by the directors; but such bye-laws are not to be at variance with the deed of settlement; and such deed of settlement, when settled and approved by the directors, shall be the proper deed of settlement for managing the affairs of this company.

“ All communications to be addressed to the secretary, at the *City of London Tavern*, until *Saturday*, the 9th of *April*, and, after that day, at the offices of the company, No. 9, *Mark Lane*.”

Applications by parties desirous of becoming shareholders in the company, were made according to the following form, which was printed and circulated by the directors, addressed to the secretary:—

“ Sir,—I request you will insert my name for — shares of the Imperial Distillery Company, and I hereby engage to make the payment thereon when requested.”

The applicant was answered by the secretary as follows:—

“ Imperial Distillery Company.

“ No.—— to ——.

“ Sir,—I am instructed by the directors of this company to inform you, that they have apportioned to you — shares of 50*l.* each in the same; and I request you will pay the deposit of 5*l.* *per* share into the hands of Messrs. *Bosanquet, Pitt, & Co., Lombard Street*, on or before the 28th instant.

“ *W. Lane*, Secretary.”

These applications for shares were made by all the defendants (except *Plummer*), and, on the 28th *March*, 1825, the deposit of 5*l.* *per* share, on the shares respectively allotted to them, was paid into the hands of the bankers, who gave in return receipts in the following form, called scrip-receipts:—

" No. — to —.

" Received of the directors of the Imperial Distillery Company the sum of fifty pounds.

" For Messrs. *Bosanquet, Pitt, Anderson, & Co.*

" 50*l.*

" *P. Stainsby.*"

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In and about the month of *May*, 1825, three of the defendants, *vis. Clifton, Wickey, and Levi*, disposed of their shares, and never afterwards interfered with the company. The whole number of shares allotted was about 7490; the number of shareholders, about two hundred. The deposit or first instalment was paid upon 2300 shares only. On the 4th *July*, a second call of 5*l. per* share was made; upon which occasion the following circular was sent to the holders of scrip:—

" Imperial Distillery Company.

" 9, *Mark Lane*, 4th *July*, 1825.

" Sir,—I have the pleasure to inform you that the directors have purchased Messrs. *Booths'* very valuable and extensive freehold distillery premises and plant at *Stanstead Abbots*, in *Herts.* This property has been surveyed by scientific persons eminently qualified to judge of its value and advantages, and they concur in the opinion that the purchase has been effected upon very satisfactory terms, the premises being of great capability, and eligibly situate for communicating with the *London* markets, and obtaining a plentiful supply of grain and every other requisite for working to advantage. This purchase will enable the company to produce spirit for the *London* market in the ensuing season; and there can be no doubt of the ultimate success of the undertaking being fully equal to the most sanguine expectations, if properly supported by the shareholders.

" The alterations in the distillery laws by the recent act are considered rather beneficial to the interests of the com-

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pany; and the directors are of opinion that at no period could an undertaking of this nature have been entered upon with better prospects of mutual advantage to the shareholders and the public.

“ For the purpose of enabling the directors to carry these very desirable objects into effect, they are under the necessity of making a call of 5*l.* on each share. You will therefore have the goodness to pay the sum of 50*l.* (being 5*l.* each on the shares allotted you) any day before the 19th instant, at the office of the company, No. 9, *Mark Lane*, when the scrip can be exchanged for shares.

“ It is particularly requested that you will not delay the payment beyond the day above named, the directors being under engagements essential to the interests of this company, which preclude the possibility of further time being allowed.

(Signed) *Wm. Lane*, Secretary.”

On the 16th *July*, 1825, the following notice was published in the *London Gazette*:—

“ Imperial Distillery Company, No. 9, *Mark Lane*.

“ Notice is hereby given that the directors have resolved on making a call of 5*l.* a share, to be paid on or before the 18th instant, and also on issuing shares in lieu of scrip-receipts; and the scrip holders are therefore requested, either by themselves or their authorized agents, to attend at the office of the company, No. 9, *Mark Lane*, for the purpose of paying to a committee of directors the amount of the shares held: also for the purpose of exchanging scrip for the shares, and of signing the deed of settlement, which has been approved of by the standing counsel and the directors. Should it be inconvenient to any scrip holder to attend for the purpose of signing the deed, printed forms of powers of attorney may be procured at the office, empowering persons to execute the deed for them; it being de-

terminated by the directors that no scrip holder can receive shares for scrip until he has first signed the deed of settlement; and no scrip can be exchanged for shares after *Monday*, the 18th instant."

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A second notice was inserted in the *London Gazette* of the 23rd *July*, as follows:—

"Imperial Distillery Company.

"Notice is hereby given to the subscribers of this company, that the deed of settlement has been approved of by the standing counsel and directors, and the same now lies ready for signature at the office of the company, *Mark Lane*. Dated 16th *July*, 1825."

The following letter was afterwards sent by the secretary to those persons who had omitted to pay the second call:—

"9, *Mark Lane*, 25th *July*, 1825.

"Sir,—I am instructed to remind you that the deed of settlement of this company, which has been approved of by the standing counsel, and signed by the directors and many of the subscribers, now waits your signature; and that, unless the same be signed, and the second instalment of 5*l.* per share paid immediately, the shares unpaid for will be forfeited, the directors having made engagements highly advantageous to the company, which preclude further time being allowed."

On the 11th and 27th *August*, the following advertisements respectively appeared in the daily papers:—

"Imperial Distillery Company, 11th *August*, 1825.

"Notice is hereby given, that, in order to accommodate those subscribers who may be absent from town, the time for signing the deed of settlement, exchanging scrip for

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share certificates, and making the second payment, has been enlarged until the 23rd instant, after which day the deposits paid and all outstanding scrip of this company will become forfeited without further notice."

27th August, 1825.

" Notice is hereby given, in pursuance of the advertisement of the 11th instant, declaring the deposits would become forfeited on all shares for which the deed of settlement should not be signed and the deposits paid on or before the 23rd instant, that such deposits on the outstanding scrip *are hereby declared to be forfeited* for the benefit of the proprietors."

On the 27th August, the following notice also appeared in the *Morning Chronicle*:—

" The progress of this company having been impeded by various obstacles in obtaining a license for the distillery premises at *Stanstead*, on which have been founded reports injurious to the opinion of its ultimate prosperity, notice is hereby given that all such difficulties are now removed, the license having been obtained; *and the company may therefore be considered as firmly established.* The most active engagements are making to supply the orders of highly respectable houses for the ensuing season. Some of the subscribers have neglected to sign the deed of settlement within the prescribed time. Applications for the remaining shares may be addressed to the secretary, No. 9, *Mark Lane.*"

The second instalment was paid upon 1106 shares only, and the deed of settlement was signed by no more than sixty-five persons. On payment of the second instalment, the scrip-receipt was given up, and the following certificate delivered to the holder of the scrip, signed by the secretary and three directors:—

“Imperial Distillery Company.

“Capital, 600,000*l.* Shares 12000—50*l.* each.

“No.—. This is to certify that —, of *London*, hath paid the sum of 5*l.* upon the above-mentioned share in this company, and that he is entitled to the same share, subject to the future instalments to be made thereon, and to the laws and regulations of the company as contained in the deed of settlement establishing the same, dated the 19th day of *March*, 1825, and also subject to such bye-laws and regulations as may be made by the directors of the company.”

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Receipts for the instalments paid were indorsed upon this certificate.

In the month of *November*, a third call of 5*l.* *per* share was made by the directors. This third instalment was paid by only about fifty individuals. Any person producing scrip-receipts, and paying the second instalment, was permitted to sign the deed, whether an original subscriber or not.

All the defendants had paid the first deposit on the shares allotted to them. The defendant *Levi* sold his shares immediately afterwards, *viz.* on the 29th *March*, on the Stock Exchange, through the medium of his broker. The defendant *Wickey* in like manner sold his shares on the 9th *May*, having only paid the first instalment thereon. *Clifton* also, about the same time, sold his shares. The defendant *Plummer* was a director, and was the only one of the defendants who had signed the deed. Of the other defendants, *Green* and *Hartley* only paid the second instalment. When the third call was made, *Green* and *Hartley* each received three letters from the secretary, demanding payment, the last of which was as follows:—

9, *Mark Lane*, 14th *January*, 1826.

“Sir,—I am now for the last time instructed by the directors to inform you, that, unless the third call of 5*l.* *per* share on the shares held by you, be paid on or before the

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21st instant, at the office of the company, you will be no longer considered a shareholder under the deed of settlement, but as having abandoned all interest in the concern; and the shareholders who may have paid will then be deemed the only parties interested in the funds and concerns of the company: and they (the directors) will forthwith adopt such measures as they may think fit, and will no longer hold you answerable for any further instalments, or entitled to receive back any sums whatever. I repeat that this is the last notice which will be sent, and that the line of conduct pointed out, in case of your non-payment, will be strictly adhered to.

“ *W. Lane*, Secretary.”

Notwithstanding these repeated notices, that parties neglecting to pay the instalments due upon their shares, and to execute the deed within the specified time, would thereby forfeit all share and interest in the concern, the shareholders were permitted at any time to sign the deed on payment of the arrears.

At the time of the allotment of shares, a book was prepared by the secretary, and kept at the company's counting-house, containing the names of the parties to whom shares had been appropriated; a copy of which book was sent to the bankers of the company, to enable them to receive the deposits from the different persons therein mentioned. The names of all the defendants were inserted in this book.

On the 24th *June*, 1825, advertisements were inserted, by order of the directors, in the various daily papers, for tenders for the necessary works at the distillery. On the 18th *July*, the plaintiffs sent in a tender, undertaking to do the work in question upon certain terms therein specified. This tender formed the basis of the contract upon which the action was founded. The plaintiffs' bill for the work done was addressed to “The Chairman and Directors of the Imperial Distillery Company.” About the time the tender was made, and before the work was commenced, one of the

plaintiffs, in conversation with *Lane*, the secretary, at the counting-house of the company, in *Mark Lane*, told him that he had been cautioned not to trust a company so large, and said, that, if he did the work, and was not paid for it, it would ruin him and his family; whereupon *Lane* assured him that he need be under no apprehension, and said, "To convince you that I am not wrong, I will shew you a list of the parties who belong to the company," at the same time producing the book containing the names of the shareholders, and shewing it to the plaintiff, who, after looking over *some of the names*, said, "Relying upon you (*Lane*), that you will not deceive me, I am satisfied." The work was accordingly done.

The Lord Chief Justice left the following questions to the Jury—*first*, whether, at the time of making the contract, the defendants were partners in the concern; in which case he told them that their verdict must be for the plaintiffs—*secondly*, whether, admitting that they were not partners in fact, they had by their conduct held themselves out to the world as partners, or allowed themselves to be so represented at the time of making the contract; in which case also he directed the Jury to find for the plaintiffs—*thirdly*, whether, admitting the defendants to have been at one time dormant partners in the concern, any one of them had ceased to be a partner before the contract in question was made; in which case his Lordship told the Jury that they must find for the defendants.

The Jury returned a general verdict for the plaintiffs, for the amount of their demand.

Mr. Serjeant *Taddy*, in *Michaelmas* Term last, on behalf of two of the defendants, *Clifton* and *Wickey*, obtained a rule *nisi* that this verdict might be set aside and a new trial had, on the ground of misdirection, and also that the verdict was against evidence.—Upon the trial, too much was left by the Lord Chief Justice to the discretion of the Jury. It was the province of the Judge to decide

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whether or not a partnership was constituted between the members of this company. That was purely a question of law. It is impossible, upon the facts proved, to say that there was any thing like a definite partnership. The premises were taken by certain persons who were called directors; the advertisement for tenders was issued by them; the work in question was done for them alone; and the bill was sent in making the directors debtors to the plaintiffs. The defendants had no legal interest in the concern. To what profits could they be entitled? There was nothing more than a contemplated partnership by deed. Until the deed was executed, no partnership was actually formed. The shares were notoriously changing hands; and whoever was possessed of the scrip-receipts was permitted to execute the deed of partnership.

Whether or not the defendants suffered themselves to be held out as partners in the company, will depend upon whether *Lane*, the secretary, was authorized by them to insert their names in a book, for the purpose of its being shewn to the creditors of the company. Now, the only acts done by the defendant *Clifton* were, his application for shares, and payment of the first instalment or call thereon to the bankers of the company. That gave no authority to the secretary to insert his name in the list for any purpose further than that of making known to the directors the parties who had paid upon their shares. The case of *Perring v. Hone* (a), would seem to be an authority in favour of the plaintiffs. There, the plaintiff's name was entered in a book with those of several other subscribers to a projected joint-stock company. The plaintiff received certain scrip-receipts, but sold them before the deed for the formation of the company was executed, and he was not a party to that deed—it was held, nevertheless, that he was a partner in the concern. That decision, however, may very well be questioned. Two of the Judges were absent

(a) 4 Bing. 28; S. C. 12 J. B. Moore, 135.

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when the judgment was delivered, and the third expressly declined giving any opinion upon the point now in issue. Lord Chief Justice *Best* said (a): "It has been contended that none were partners but they who signed the deed. But all who subscribed to the partnership fund must be taken to have assented to the deed; an assent which the plaintiffs countenanced by afterwards attempting to dispose of their interest. Even if there had been nothing in the deed to bind them, they could only get rid of that interest by regular notice in the *Gazette*; but it was provided by the deed, that notice should be given to the directors of the person to whom it was proposed by any of the members to make a transfer. Without such a provision, any person might hold a share as long as it was advantageous, and then dispose of it to a pauper, cheating the creditors and his co-contractors. But a party who has once engaged in a concern of this nature cannot so easily divest himself of his liability." That principle cannot be supported in law. The parting with shares has manifestly a contrary tendency; persons who have sold their shares are not to be allowed to execute the deed.

Mr. Serjeant *Spankie* appeared for *Plummer* and *Lawson*; Mr. Serjeant *Adams* for *Green*, *Hartley*, and *Levi*; and Mr. Serjeant *Jones* for *Fennell*.

In the course of the same term, Mr. Serjeant *Wilde* and Mr. Serjeant *Bompas* shewed cause generally; and Mr. Serjeant *Taddy*, Mr. Serjeant *Adams*, and Mr. Serjeant *Jones*, were heard in support of the rule.

The Court, having taken time to consider, in the following *Easter* Term directed that the case should be re-argued by one counsel on each side, the argument to be confined to the question of partnership only. The case accordingly came on for argument in the last term.

(a) 4 Bing. 32.

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Mr. Serjeant *Bompas*, for the plaintiffs.—From the evidence given upon the trial of this cause, it appears that, shortly after the formation of the company in question, the defendants applied for and obtained allotments of shares therein. They were therefore once partners in the concern; and it remains to be considered whether they have since legally discharged themselves from their liability as such.

The proper definition of a joint-stock company is, a company incorporated by charter or act of Parliament, whereby the joint-stock only is rendered liable for the contracts of the company, or its members to the extent of the sums subscribed by each, protected from ulterior liability. The present is not the case of a company so constituted; but that of an extensive partnership, not governed by any charter or act of Parliament to restrain or narrow the liability of the respective partners. In the case of *Natusch v. Irving* (a) Lord *Eldon* said: “It is not, I apprehend, competent to any number of persons (unless they shew a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and, in effect, merely by *compelling* them to retire upon such terms, so to form a *new company*. This would, as to partnerships, be a most dangerous doctrine. It may be taken that the principle that would apply to the partnership of six, will apply to this partnership of six or seven hundred.” And in *Rex v. Dodd*, Lord *Ellenborough* said (b): “Independent of the general tendency of schemes of the nature of the project now before us to occasion prejudice to the public, there is besides in this prospectus a prominent feature of mischief; for, it therein appears to be held out that no person is to be accountable beyond the amount of the share for which

(a) Gow, on Partnership, Appendix, 404.

(b) 9 East, 527.

he shall subscribe; the conditions of which are to be included in a deed of trust to be inrolled. But this is a mischievous delusion, calculated to ensnare the unwary public. As to the subscribers themselves, indeed, they may stipulate with each other for this contracted responsibility; but, as to the rest of the world, it is clear that each partner is liable to the whole amount of the debts contracted by the partnership." The same principle is laid down in the cases of *Carlen v. Drury* (a), and *Baldwin v. Lawrence* (b). Whether the partnership were complete or inchoate and incomplete, the members are equally liable for the contracts of the company, as they would have had a joint interest in the profits had any been realized. In equity, the executors of a deceased partner are entitled to the profits of the testator's capital used by the surviving partners. *Brown v. De Tastet* (c). So, in the case of the capital of a minor. In an *Anonymous* case (d), the Master of the Rolls said:—"Where a trustee has money of an infant to lay out in the funds for the infant's benefit, and lays it out in trade, which produces 10*l. per cent.*, the Court will give that infant an option either to have interest for the money, or the profits of the trade."

In *Ex parte Layton* (e), a question having been raised, as to whether and under what circumstances a trader could plead in abatement a partner abroad, Lord *Eldon* said, that, "if persons will deal without inquiring of whom the firm consists, it does not follow necessarily that in that case a plea in abatement would not do." Where an individual is publicly held out as a partner in a concern (as were the defendants in this case, by the exhibition, at the counting-house of the company, of the list containing their names as being shareholders and members), he is in law liable for all the contracts made by the company under the sanction

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(a) 1 Ves. & Bea. 154.

(b) 2 Sim. & Stu. 18.

(c) 1 Jacob, 284.

(d) 2 Vez. 629.

(e) 6 Ves. 438.

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of his name. In *Young v. Axtell and Another* (a), which was an action for coals sold and delivered by the plaintiff, a coal-merchant, an agreement between the defendants was given in evidence, stating that the defendant Mrs. *Axtell* had lately carried on the coal trade, and that the other defendant did the same; that Mrs. *Axtell* was to bring what customers she could into the business; and that the other was to pay her an annuity, and also two shillings for every chaldron that should be sold to those persons who had been her customers, or were of her recommending. The plaintiff also proved *that bills were made out for goods sold to her customers, in their joint names*; and the question was, whether Mrs. *Axtell* was liable for the debt. Lord *Mansfield* said, "he should have rather thought, *on the agreement only*, that Mrs. *Axtell* would be liable, not on account of the annuity, *but the other payment, as that would be increased in proportion as she increased the business*. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of the dealing, know that she was a partner, or that her name was used:" and the Jury accordingly found a verdict for the plaintiff. In *Holmes v. Higgins* (b), a number of persons associating together and subscribing sums of money for the purpose of obtaining a bill in Parliament to make a rail-way, were held to be partners in the undertaking; and therefore a subscriber, who acted as their surveyor, could not maintain an action for work done by him in that character on account of the partnership, against all or any one of the other subscribers. Lord Chief Justice *Abbott* there said: "This is the case of a number of persons jointly associated together for a common purpose. The plaintiff and defendant were both members of the association. This action is brought against the defendant, who acted

(a) Cited in *Waugh v. Carver*,
 2 H. Blac. 242.

(b) 1 Barn. & Cress. 74; S. C.
 2 Dow. & Ryl. 196.

as chairman at the meeting, when the work done was probably ordered; and he might have pleaded that he undertook jointly with the other subscribers. The members of the association were therefore partners." In *Kearsley v. Codd* (a), which was an action against a subscriber, for goods sold to "The *London Carrier Company*," it was contended on the part of the defendant that the company was never regularly constituted, and that consequently there was no complete partnership. But Lord Chief Justice *Abbott* said, that that would make no difference; and that it was important that the public should know, that, if persons connected themselves with a company of that description, they were every one of them liable to pay the demands upon it. In *Maudslay and Another v. Le Blanc* (b), which was an action for work done by the plaintiffs, engineers, for the *Steam Washing Company*, it appeared that in *May*, 1825 (previously to which time the order for the work in question had been given), the defendant was described as a director in a prospectus issued by the company, one of the terms of which was, that a deed should be executed by the members. It was contended, on the part of the defendant, that there was no evidence to connect him with the particular order, that the terms of the prospectus shewed that there must be a deed, and therefore that the plaintiffs were bound to shew that he had executed the deed. But Mr. Justice *Bayley* said: "I think they are not. I shall take it for granted that the defendant would never have continued to act as a director so long without he had executed the deed." It appears to me that he is liable as a partner. He was at the meetings of the directors, acting from time to time, and went to see the works in progress. I think, therefore, it is impossible to say that he is not liable." The case of *Lawler v. Kershaw and Others* (c) decided, that, where a party had paid a deposit with a view to his becoming a shareholder in a

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(a) 2 Carr. & Payne, 408. (b) Ibid. 409. (c) 1 Mood. & Malk. 93.

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company of this description, he became a partner therein from the time of paying the deposit. In that case, all the defendants with the exception of one, *viz. Barber*, were directors. After the delivery of the last of the goods for which the action was brought, *Barber* and the other defendants signed the deed establishing the company, all the defendants having previously paid the deposits upon the shares allotted to them. With reference to *Barber*, Lord *Tenterden* said: "He was not a director at any time during the supply of these goods; and the evidence against him is only that he paid his deposit on the 16th *April*, and that, at a period after all the goods were supplied, he signed the deed of partnership. A question has been raised, whether the mere payment of his instalment is sufficient to constitute him a partner; but I think I am not called on in this case to decide that point. There is another fact here, that, after the payment, Mr. *Barber* executed the deed. I think that is a good recognition of his former payment as a transaction connected with the partnership, and shews that, in making it, he considered himself as becoming a partner; and, consequently, taking the two facts together, and not inquiring what might have been the effect of the payment standing singly, that Mr. *Barber*, in this case, was clearly a partner from the period when it was made." A verdict was accordingly found for the plaintiff for the amount of the goods supplied after the day on which the payments were made by the defendants on their shares. The execution of the deed there was considered as evidence of the intention with which the instalment was paid. In the case of *Perring and Others v. Hone* (a), the names of two of the three plaintiffs were entered in a book, together with those of several other persons (of whom the defendant was one), as subscribers to the same company upon which the question in the present case arises; the two plaintiffs received, as shareholders, certain scrip-re-

(a) 12 J. B. Moore, 135; S. C. 4 Bing. 28.

ceipts, but sold them previously to the execution of the deed of partnership, which they did not sign; and the plaintiffs advanced money to the concern—it was held, that they, two of them being partners in the concern, could not recover from the defendant the money so advanced; and that those plaintiffs could not divest themselves of their character of partners, by the mere passing away of their shares in the market. That decision was confirmed by the subsequent case of *Ellis v. Schmæck* (a). There, the defendants had purchased the scrip of a mining company originated in fraud, and had attended one meeting of the company; but they never signed the partnership deed, were innocent of the fraud, and transferred their scrip before the plaintiff commenced an action for goods furnished to the company after the defendants had purchased their scrip—it was held, that they were still liable for the debts of the company. In *Bird v. Aston* (b), which was likewise an action brought to recover the value of goods sold and delivered to a company similar in character to the present, one of the defendants, *Knibbs*, being a broker, Lord *Tenterden*, before whom the cause was tried, was inclined to think that he was not liable, a broker being supposed to be merely an agent in the buying and selling of stock for others; but, it appearing that he had signed the deed of settlement of the company, that fact was taken to shew his intention in paying the instalments, and he was held equally liable with the other defendants. In *Braithwaite v. Skofield* (c), it was proved that the defendant had contributed to the funds of a building society, and had been present at a meeting of the society, and party to a resolution that certain houses should be built—it was held, that this made him liable to an action for work done in building those houses, without proof that he had any actual interest in them, or in the land on which they were

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(a) 5 Bing. 521; S. C., ante, Vol. 3, p. 220.

(b) Not reported.

(c) 9 Barn. & Cress. 401.

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built. On a motion to enter a nonsuit in that case, *Vice v. Lady Anson* (a) having been cited, Lord *Tenterden* said—"The present case is very distinguishable from that which has been cited. There, the plaintiffs could have no right to recover against the defendant, except in respect of her having an interest in the mine; and they failed in the attempt to prove that interest. Here, the plaintiffs had a right to be paid by those who employed them, and the defendants, having joined in a resolution to build the houses, authorized the employment of the workmen. That circumstance, without reference to the title to the land upon which the houses were built, is sufficient to make the defendants liable in the action." This case is exactly analogous; for, here too, the defendants contributed to the funds of this society, and were parties consenting to the resolution that the distillery should be carried on.

Mr. Serjeant *Taddy*, for the defendants.—The sole question to be now discussed is, whether or not, at the time the work for which this action is brought was performed, there was an actual partnership existing between these parties—not whether the defendants held themselves out as partners. The principal facts of the case are shortly these:—The several defendants applied for shares, and received notice that a certain number had been respectively allotted to them; whereupon they appear to have paid the first instalment or deposit thereon to the bankers of the company, obtaining from the bankers a receipt (called a scrip-receipt) in the following form—"Received of the directors of the Imperial Distillery Company the sum of £—." Some of the defendants paid only this one instalment, others paid a second, and one of them signed the deed of settlement. Any person bringing to the secretary of the company the above scrip-receipt was ad-

(a) Cited *post*, p. 702.

mitted to sign this deed. Of the whole of the shareholders, sixty-five only did actually execute it, and of these thirty were not original subscribers, but persons who had purchased shares after the payment of the first instalment.

It is assumed, that the company was formed on the 19th *March*, 1825. It is true that, on that day, a meeting was held, at which meeting directors, a secretary, engineer, &c., were appointed; but there was no proof that any of these defendants were present at that meeting. Advertisements and a prospectus were afterwards published, describing the company about to be formed as being a company intended to consist of a capital of 600,000*l.*, in 12000 shares of 50*l.* each, and stating that—"A deed of settlement will be prepared forthwith, which must be executed within thirty days after the same shall be ready for that purpose; and every person who shall neglect to execute the same within that time, will forfeit all share and interest in the company." Such, therefore, were the terms, and such was the contract, under which these defendants contemplated entering into a partnership; and the question is, whether, upon the above state of facts, the defendants were actually partners in the concern, or were so far jointly interested with each other therein, as to be liable to the demand of the plaintiffs.

It does not necessarily result from the equity cases cited on the other side, *viz.* the anonymous case in *Vexey*, and *Brown v. De Tastet*, that an individual becomes a partner merely because he has property embarked in a concern. Those cases proceed upon this principle, that one who uses another's property shall not refuse to account for the profits—not that there is a partnership between them for all purposes.

It appears here, that the directors purchased Messrs. *Booths'* distillery at *Stanstead*: so that the interest of the defendants, if any, was an interest in real property. The work done by the plaintiffs was done upon these premises.

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The subject-matter of the partnership being uncertain—the persons who were to be members of it being also uncertain—the amount of the fund, and the number of the individuals, of which it was to be composed, being fixed, but not subscribed or filled up—it is perfectly clear, that, although there might have been an intention on the part of these defendants and the other shareholders to constitute themselves partners in a joint speculation, yet, until all the proposed arrangements had actually been carried into effect, by the sale of a given number of shares, and the raising of a given amount of capital, they were not partners in the proper sense of the word. It is manifest that the defendants contracted with reference to a company to be incorporated in a given manner, and intended the formation of a partnership when certain stipulated arrangements should be completed. In *Vice v. Lady Anson* (a), which was an action for goods supplied for the purpose of working a mine, it appeared that the defendant had paid money for certain shares, and received a certificate that she was a proprietor of those shares; and that she had acknowledged that she was a shareholder: but no assignment of any interest in the mine had been made to her—it was held that the action could not be maintained. At the trial of that cause, Lord *Tenterden* said (b): “It is clear, in this case, that the plaintiff did not actually give credit to Lady *Anson*, and that she never held herself out to the world as a partner. If, therefore, she is chargeable, she can only be so on the ground that she is really interested; and no mistaken supposition of her own that she was so would make her liable, unless it were communicated to the plaintiff so as to mislead him. The partnership, if any, is not strictly a trading partnership: it is one formed for the purpose of working a mine, a species of real estate; and the plaintiff’s claim

(a) 7 Barn. & Cress. 409; S. C. 19; 1 Mood. & Malk. 98.
1 Man. & Ryl. 113; 3 Carr. & P. (b) 1 Mood. & Malk. 99.

is for labour and goods employed in the working that mine. An interest in a real estate can only pass by certain formalities; and it is clear, that the certificates are not sufficient to pass it, nor would the registration in the act-book of the company, as mentioned in them, even if it were made, of which there is no proof, be so." The plaintiff was accordingly nonsuited, and the Court afterwards, on motion, refused to set aside the nonsuit. Have the defendants in the present case any interest in the distillery, which is real property? It cannot be said that they are partners as to some part of the property, and are not interested in the distillery. The case of *Lawler v. Kershaw* shews the light in which cases of this description were viewed shortly anterior to the case of *Vice v. Lady Anson*. There, *Barber* was the only defendant who was not a director, and he had signed the deed constituting the partnership. His execution of the deed, connected with the antecedent payment of the deposit upon his shares, was held sufficient to render him liable. Lord *Tenterden* says—"Taking the *two facts* together, and not inquiring what might have been the effect of the payment standing singly, he thought that Mr. *Barber* was clearly a partner from the period when it was made." Those cases which relate to directors only are not within the scope of the present argument. *Maudslay v. Le Blanc* was a case of this description. *Perring v. Hone* turned upon the simple question whether a shareholder who had not signed the deed, but had passed away his scrip, had thereby got rid of his liability. Lord Chief Justice *Best* there said (a): "It has been contended, that none were partners but they who signed the deed. But all who subscribed to the partnership fund must be taken to have assented to the deed; an assent which the plaintiffs countenanced by afterwards attempting to dispose of their interest." That proposition

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(a) 4 Bing. 32.

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does not appear to have received the assent of the other Judges. Besides, no evidence was on that occasion given as to the terms of the formation of the company; and the point now under discussion was not presented to the Court, or even alluded to in any way. In *Ellis v. Schmæck*, Mr. Justice *Park*, in delivering the judgment of the Court, said (a): "We think the Jury have by their verdict gone very far to conclude the question; because they find that the defendants formed part of a company, which indeed was founded in fraud, but they have acquitted both the defendants and the plaintiff of any cognizance of that fraud." It appeared, however, that the defendants had attended several meetings of the company. In *Braithwaite v. Skofield*, the defendants were proved to have been parties to a resolution that the houses upon which the work in question was done, should be built. In *Bird v. Aston*, the deed was executed by all the defendants. Now, the executing a deed is a fact of which a distinct idea may be formed. In *Dickinson v. Valpy* (b), where it was sought to charge the defendant as a member of a mining company, upon a bill drawn and accepted by order of the directors, it was proved that the company had entered into a contract for the purchase of mines, taken a counting-house in *London*, engaged clerks, and also an agent to reside in the country, and had worked some of the mines; that the defendant having applied to the secretary of the company for shares, some were appropriated to him; that he paid an instalment of 15*l.* *per* share; that he attended at the counting-house of the company, and there signed some deed, and afterwards attended a general meeting of the shareholders—the Court inclined to think that there was not sufficient evidence to shew that the defendant had ever become a complete partner in the company, or that he had held himself out to the world as such partner. Mr. Justice *Bayley* there said:

(a) *Ante*, Vol. 3, p. 228.

(b) 10 Barn. & Cress. 128.

“ I am not prepared to say that there was sufficient evidence to charge the defendant, either as an actual partner, or as a person who held himself out to the world as a partner.” And Mr. Justice *Parke* said: “ Undoubtedly, if there is a complete partnership between two or more persons, one partner does communicate to the other standing in the relation of complete partner, all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged. The plaintiff, therefore, must begin by shewing that the defendant stood in the situation of complete partner. He says, I can shew that; in the first place, because the defendant has represented himself to be so. And if it could have been proved that the defendant had held himself out to be a partner, not ‘ to the world,’ for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a Jury that *the plaintiff* knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement. There is, however, no ground in this case to say that the defendant ever held himself out to the world, still less that he held himself out, either directly or indirectly, to the plaintiff, as a partner. Therefore, upon the ground of representation, he is not liable. It is next said, that he was bound, because he was in point of fact a partner. It is to be observed, that, amongst the circumstances relied upon to shew that, was the fact of the defendant’s attendance at some meeting of the shareholders; but, as the learned Judge shut out the evidence of what passed at the meeting at which the defendant attended, that attendance.

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ought not to have been used against him; and therefore, on that ground, it seems to me there ought to be a new trial. But I think that, in this case, it is very difficult to say that there was sufficient evidence to go to the Jury, that the defendant actually was a partner; because all the acts proved and relied upon at the trial were equally consistent with the supposition of an intention on his part to become a partner in a trade or business to be afterwards carried on, provided certain things were done, as with that of an existing partnership. There is a great difference between the two cases. If there is a contract to carry on any business by way of present partnership, between a certain definite number of persons, and the terms of that contract are unconditional or complete, I have already said, that the partners give to each other an implied authority to bind the rest to a certain extent. *But, if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed.* If any of the other partners in the mean time enter into contracts, it seems to me to be clear, that he is not bound by them, on the simple ground that he has never authorized them—always supposing that he has not held himself out, directly or indirectly, to the party with whom the contracts are made, as having, in substance, given that authority. In those cases in which a plaintiff has not been induced by the defendant's representation *to give credit to him*, but seeks to fix him because he has *really authorised* the contract to be made, the plaintiff must shew that authority, and an authority upon condition not performed, is no authority at all."

Here, nothing complete was done. The only act from which it is sought to impose a liability upon the defendants is, the payment of the deposits to the bankers; and that must

be taken with reference to the basis on which the company was to be formed. Those who gave orders for the work done by the plaintiffs, are clearly liable; and those who were directors are also liable, inasmuch as they permitted their names to be announced to the public in connection with that character. But, with regard to the mere shareholder, who, like these defendants, has only paid money, and thereby become the dupe of more designing men, is he a partner? and, if so, with whom? Is it with those who originally subscribed to the concern, or only with those who have executed the deed of settlement? *Harvey v. Kay* (a) is the strongest case to be found in favour of the plaintiffs; but there it appears that the defendant had been a director, and had come under the terms of the deed, although it did not appear that he had actually executed it. But *Bourne v. Freeth* (b) is precisely in point for the defendants. There, it being in contemplation to form a company for distilling whiskey, the following prospectus was issued in *May*, 1825:—"The conditions upon which this establishment is formed are, the concern will be divided into twenty shares of 100*l.* each, five of which to belong to *A. B.*, the founder of the works; the other fifteen subscribers to pay in their subscriptions to *M. & Co.*, bankers, *Liverpool*, in such proportions as may be called for. The concern to be under the management of a committee of three of the subscribers, to be chosen annually, on the 10th of *October*; ten *per cent.* to be paid into the bank on or before the 1st of *June* next." It was held, that this prospectus imported only that a company was to be formed, not that it was actually formed; and that a person who subscribed his name to this prospectus, and who was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the

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(a) 9 Barn. & Cress. 356.

(b) 9 Barn. & Cress. 632; S. C. 4 Man. & Ryl. 512.

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distillery, which were afterwards taken, and solicited others to become shareholders, but never paid his subscription, was not chargeable as a partner for goods supplied to the company. Lord *Tenterden* there said: "On this evidence, I think that the defendant was not a partner, as between him and the other persons who contemplated being members of the company, whoever they might be. But, although he might not actually be a partner, yet, if he held himself out to the world as a partner, he will be chargeable. The question whether he did hold himself out to the world as a partner, depends entirely on the effect of the prospectus which he signed. That instrument indicates that a company was about to be formed, not that one was actually formed. It shews only that it was in the contemplation of the parties who had subscribed their names to it, to establish a company on certain conditions. The words relied upon to shew that the company had actually been formed are—'The conditions upon which this establishment is formed are, &c.' Undoubtedly, the import of those words, taken by themselves, might be, that a company was actually formed. But the remaining parts of the prospectus import that a company was to be formed thereafter. The defendant, therefore, had subscribed his name to a paper, the import of which was, that a company was to be formed thereafter. His having signed that paper does not indicate to any person who reads it that he has become a member of a company already formed. He has not, therefore, held himself out to the world as a partner in a company already formed." Mr. Justice *Bayley* said: "The prospectus imports that something was to be done before a partnership was to be formed, not that it was already formed." And Mr. Justice *Littledale* said: "The goods were not ordered by the defendant, but by another person. That person could not bind the defendant without some authority, express or implied. He had no express authority; but it is said that he had an implied

authority, because he was a partner, and one partner has an implied authority to bind another in partnership transactions. Then, the question is, whether the defendant was a partner. Unless there was a partnership formed, the defendant could not be an actual partner. It is clear that a partnership was never actually formed between the defendant and the other persons who contemplated carrying on the establishment. The defendant, therefore, did not give any implied authority to the person who ordered these goods of the plaintiff, to bind him; consequently, he is not liable to pay for them."

After going through all the cases, the question still returns to this—what were the terms upon which the payment of the deposits was made by the defendants? The deed of settlement was to be signed within a given time, or, in default, the shareholders were to forfeit all interest in the concern. These defendants, (with the exception of *Plummer*), not having signed the deed, would clearly not be entitled to participate in any profits accruing to the company.

Mr. Serjeant *Bompas*, in reply.—*Peacock v. Peacock* (a) is an authority to shew that the mere uncertainty

(a) 2 Campb. 45. There, a father established in business, on his son's coming of age, told him he should have a share in it, and held him out to the world as his partner. The son acted as such for several years; but there was never any thing settled as to the particular share which he should have. Upon an issue directed by the Lord Chancellor, to try whether the son was beneficially a partner with the father, and, if he was, for what share, not exceeding one moiety of the profits—Lord

Ellenborough said: "A man who renders himself liable to third persons as a partner, may in truth be the mere agent or servant of his supposed copartner, and entitled only to fixed wages. But, in the present case, the presumption of law, instead of being repelled, is confirmed. The defendant evidently gave his son a beneficial interest in his business, leaving the amount to be settled when the books should be balanced. There is no pretence, however, for saying that the plaintiff is en-

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of amount of profits that a party may be entitled to, does not make him the less a partner. It has been said, that the defendants did nothing to constitute themselves partners in this concern, beyond the naked fact of the payment of the deposits upon the shares allotted to them. They, however, did more; they entered into a correspondence with the organs of the company, to cause their names to be inserted in the company's books, as shareholders. In *Vice v. Lady Anson*, the ground of decision was, that the certificate given by the company did not convey an interest in the land, which was the only property of the concern: and in *Dickinson v. Valpy*, the real question in the case was quite beside the present, *viz.* whether the company was a trading company, and so constituted as to enable one to bind the whole of the members by signing bills of exchange. In *Harvey v. Kay*, Lord Tenterden said: "I think that, although the execution of the partnership deed by *Reynolds* was not proved, yet his own letters shew that he had become a partner according to the terms of the deed. Then, the only question is, had he done enough to relieve himself from his liability as a partner. No actual transfer of his shares was proved; no execution of the deed by *Jeffery*, to whom the transfer was intended to have been made; and no acts of *Jeffery* by which it would appear that he had made himself chargeable as a partner. There was evidence, therefore, to shew that *Reynolds* was a partner, but none that he had ceased to be so." *Bourne v. Freeth, e converso*, is applicable to this case. The company there was expressly stated to be *forming*.

Cur. adv. vult.

titled to a *moiety* of the profits; and the Jury must consider what is a fair and just proportion for the father to give, and the son to expect, after what has passed be-

tween them." The Jury found that the plaintiff was entitled to a *fourth* part of the profits of the partnership trade.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This action was brought by the plaintiffs against the eight defendants, to recover the amount of a demand for goods sold and delivered by the plaintiffs to the defendants, and for work and labour done, and materials found by the plaintiffs, for them, and at their request.

It appeared, at the trial of the cause, at *Guildhall*, that the contract upon which the action was founded, was not made personally and individually with the defendants, but with the chairman and directors of a certain joint-stock company, called the Imperial Distillery Company; the contract being a tender sent in by the plaintiffs on the 18th *July*, 1825, addressed to such chairman and directors, in answer to an advertisement which had been published by the directors on the 24th *June*, stating their readiness to receive tenders for the supply and erection of the works in question. But it was contended at the trial, that, upon the evidence in this case, the eight defendants must be considered partners in this company; or, if not partners, that, at all events, they had allowed themselves to be so held out to the plaintiffs, and were therefore bound by the contract of the directors, and liable to the payment of the plaintiffs' demand.

Three questions were left to the Jury at the trial—*first*, whether, at the time of making this contract, the defendants were partners in this joint concern; in which case, the Jury were told that the verdict must be for the plaintiffs—*secondly*, admitting that the defendants were not partners in fact, whether they had by their conduct held themselves out to the plaintiffs as partners, or allowed themselves to be so represented, at the time of making this contract; in which case also, the Jury were directed to find for the plaintiffs—and, *thirdly*, whether, admitting the defendants to have been at one time dormant partners in this concern, any one of them had ceased to be a partner before the contract in

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question was made; in which case, the Jury were told that they were to find for the defendants.

The Jury found a general verdict for the plaintiffs for the amount of their demand, and the case now comes before the Court upon a rule obtained by the defendants to set aside that verdict, and for a new trial, as well upon the ground that the direction on the first point was not a proper direction, as also that the verdict was against the evidence given in the cause.

The main and important question in this case undoubtedly is, whether, under the circumstances proved at the trial, the defendants were actually partners in the Imperial Distillery Company; for, if partners, the general principle which governs all partnerships in trade, would apply to the present case—that each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern; and, consequently, that he is liable to the performance of all such contracts, in the same manner as if entered into personally by himself.

But, before we give our judgment upon this, the principal question, it may be convenient to clear the case of the second point which has been made, *vis.* whether the defendants have held themselves out to the world generally, or to the present plaintiffs in particular, as partners in the present concern; for, if such should be the result of the evidence, it would render any inquiry into the first question altogether immaterial.

Now, the evidence upon which the plaintiffs contend that the defendants permitted themselves to be represented to the plaintiffs as partners in this concern, is, that the secretary to the company had prepared a book containing a list of the names of all those persons to whom shares in the concern had been allotted, in which list the names of the eight defendants had been included; that this list had been left with the bankers of the company,

to enable them to receive the deposits from the contributors, upon which list the payments had been made and receipts given at the banking-house; and that a copy of it was lying upon the table of the counting-house belonging to the company, where it was seen by one of the plaintiffs, when he called upon the subject of the contract; and that, on one occasion, when the plaintiffs were expressing a doubt about trusting such a numerous company, the secretary opened the book, and one of the plaintiffs looked over some of the names. The book itself, when referred to, was found to contain, on the different pages, lists of the names of the several persons to whom shares had been allotted, arranged alphabetically, one leaf being assigned to each letter of the alphabet; and the whole number of names consisted of upwards of two hundred: so that the merely opening the book in the counting-house, and seeing some of the names, could not, in the ordinary course of things, give any intimation to the plaintiffs that the names of the eight defendants were included in the list. Indeed, it is not argued on the ground that the plaintiffs saw the names of the defendants in this list, but that the bare circumstance that their names were included in such list used for the purposes above specified, by their own permission, was a sufficient holding themselves out to the world as partners in the company. But, in the first place, there was no evidence that the defendants knew of the existence of any copy of the list at the counting-house; still less any evidence that such list was made up or shewn to any one with their permission or knowledge. The holding oneself out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used. Thus, in the ordinary instances of its occurrence, where a person

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allows his name to remain in a firm, either exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, are the very grounds upon which he is estopped from disputing his liability as a partner. That there must have been some list of the subscribers to so numerous a company, the defendants may indeed be taken to have known; it would have been impossible to make calls for deposits, to give notices, or to do any of the acts necessary for carrying on the concern, without having a written list of the names of the subscribers. So far, therefore, the authority of the defendants to the existence of a list may be assumed. But that implies no authority whatever that a copy should be made out, to lie in the counting-house for the purpose of being shewn to strangers who might demand to look at it: and still less could the list left with the bankers be considered as making any communication to the world with the assent of the defendants. That list was a matter in strict confidence and privacy between the bankers who received the money and the party who called with the letter in his hand and paid the deposit. It held out no information to the public, because not communicated to any third person whomsoever. Even upon the face of the book itself, it conveyed no information of the relation in which the parties stood to each other; as it contained nothing but a long list of names, without any notice or heading whatever; leaving it altogether uncertain whether the persons named are partners in any concern actually established, or merely subscribers to a projected partnership. And, as to the receipt given by the bankers for the deposit, and called the scrip-receipt, it could give no information to any one; for, it was a receipt given to the directors, *eo nomine*, and not to the individual paying the money. But, without reference to the information which the plaintiffs actually received from

the book, we think the communication of this book was no act done by the defendants themselves, or by their authority or permission, so as to make them nominal and ostensible partners, in contradistinction to real partners, or sharers in the profits of the concern; so that the verdict, if it rested on this part of the evidence, could not be supported.

The question, therefore, must be considered, whether, upon the facts of this case, the defendants were partners in the Imperial Distillery Company, with the directors and other shareholders, at the time this contract was made; for, by the general rule of law relating to partnerships in trade, each would then be liable to the debts of the whole company contracted in the course of the trade. This is a consequence not confined to the law of this country, but extending generally throughout *Europe*; and it is founded, partly with the object of favouring commerce, that merchants in partnership may obtain more credit in the world; and more especially on the principle that the members of trading partnerships are constituted agents, the one for the other, for entering into contracts connected with the business and concerns of the partnership; so that, by the contracts of the agent, all his principals are bound (a).

The question, therefore, becomes this—whether, at the time of this contract made by the directors, the relation between the defendants and them was such that the directors were constituted the agents of the defendants, to bind them by their contracts.

The first act done on the part of the defendants is, an application by letter from each of them, except one, requesting the name of the party to be inserted for a certain number of shares in the Imperial Distillery Company, and engaging to make payment thereon. All these letters appear to have been written between the 2nd and the

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(a) See *Pothier, Traité du Contrat de Société*, Ch. 6, s. 1.

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23rd of *March*; and so completely was the company unformed at that time, that the letters were addressed to Messrs. *Fisher & Norcutt*, who acted as solicitors for the persons, whoever they might be (for, it does not distinctly appear), who were endeavouring to establish the concern. On the 19th *March*, a public meeting was held, which was attended by many persons—whether by the defendants or not, there is no evidence—at which meeting, according to the language of the secretary, “the company was formed.” On the 23rd *March*, an advertisement appeared, headed, “Imperial Distillery Company—Capital, 600,000*l.*, in twelve thousand shares, of 50*l.* each”—giving the names of the trustees and other officers, and advertizing to other particulars which it will be necessary to refer to hereafter. It was not until the 24th, the day following the advertisement, that an answer was sent to the different applicants, signed by the secretary, who had been appointed in the meantime, informing them that the directors had appropriated a certain number of shares to each, and requesting them to pay the deposit of 5*l.* per share into the hands of the bankers, on or before the 28th of *March*.

Now, the advertisement describes the proposed undertaking as “*The Imperial Distillery Company*.” It is said that this description assumes that it is a company already formed. But the very circumstance of publishing an advertisement proves that it was only a project for a company, not a company actually formed; for, if the 600,000*l.* had been subscribed, and the twelve thousand shares allotted, why publish an advertisement? It could only be intended for the purpose of inducing others to subscribe. The description employed in the advertisement, of the advantages to be gained by the subscribers, proves also the object of the publication: and the conclusion points more directly to the *future* formation of a company. It states “that a deed of settlement will be prepared forthwith, which must be executed within thirty

days after the same shall be ready for that purpose; and every person who shall neglect to execute the same within that time, shall forfeit all share and interest in the company. The deed is to contain all such clauses and conditions as the standing counsel and solicitors to the company shall deem necessary. The shares will be forthwith allotted; and, until offices are taken, all communications are requested to be made to the directors, at the *City of London Tavern*."

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The advertisement is the basis of the contract between the parties; it is upon the footing of this prospectus that the eight defendants had their shares allotted to them, and paid their deposits. If they are not partners under this agreement, they are not partners under any; for, they neither exchanged their scrip-receipts for certificates of shares, nor executed the deed when prepared, nor paid a second call when made, nor appeared at any meeting, nor interfered with any concerns of the company, nor did any act subsequent to the making of this contract, nor any act before, other than applying for shares, and paying the deposit of 5*l.* per share, when they learned from the letter of the secretary that a certain number of shares was appropriated to them.

The paying of the deposits must undoubtedly be taken to imply an assent to the terms of the advertisement; that is, an assent to become partners in a company raising a capital of 600,000*l.*, consisting of twelve thousand shares, and to be governed by a deed which should contain the clauses and conditions to be agreed on in future: but we think it implies nothing more; and that it cannot be construed as an assent to the terms of a partnership already formed.

When, therefore, instead of an allotment of twelve thousand shares, the utmost that were ever allotted scarcely exceeded seven thousand five hundred; when, out of that number, no more than two thousand three hundred ever paid the first instalment; when not half the

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latter number paid the second instalment, and only sixty-five subscribers signed the deed—we think that the subscribers were at liberty to say, this was not the trading company upon which we paid our deposits; neither the capital nor the number of shares bearing any reasonable proportion to the original plan and project. And this the more especially, because, by the terms of the advertisement, they were taught to expect that the utmost risk which they encountered was, the loss “of all share and interest in the concern,” upon their refusal to execute the deed; which loss they appear to have submitted to.

There are no facts subsequent to the payment of the deposit which in any manner affect the eight defendants. On the 30th *June*, the deed was prepared for signature, and, shortly afterwards, signed by the directors and those of the shareholders who paid the second instalment, not exceeding sixty-five in number; and it is not immaterial to observe, that, so little was the partnership considered as fixed before the execution of the deed, that, according to the evidence of the secretary, any person producing a scrip-receipt and paying the second call, whether an original subscriber or not, was permitted to execute the deed. The defendants, however, on this record, with the exception of *Plummer*, never executed the deed, nor did any more than two of them ever pay the second instalment.

On the 16th *July*, there was an advertisement in the *Gazette*, making a second call of 5*l.*, and informing the subscribers, “that it had been determined by the directors that no scrip holder could receive shares for scrip, until he had first signed the deed of settlement, and that no scrip could be exchanged for shares after *Monday*, the 18th instant.” The defendants, except as above, neither exchanged their scrip nor executed the deed. On the 12th *August*, the directors advertised that the deposits would become forfeited on all scrip for which the deed of settlement was not signed, and the first call paid, on or before the 23rd; and, on the 27th *August*, a second ad-

vertisement appeared, declaring "that such deposits on the now outstanding scrip were forfeited for the use and benefit of the proprietors," and authorizing applications to be made for the shares so forfeited.

At this moment, therefore, the consequence had followed which the original prospectus had declared, *vis.* "the forfeiture of the deposits, and all interest and share in the concern;" and no subsequent offer by the directors to allow the subscribers to be restored to their shares, upon the execution of the deed, could alter their relation to each other, unless assented to by themselves.

Upon the first question, therefore, whether a partnership was actually formed—we think, that, if the right to participate in the profits of a joint concern is to be taken, as undoubtedly it ought to be, as the test of a partnership, these defendants were not entitled at any time to demand a share of profits, if profits had been made, inasmuch as they had never fulfilled the conditions upon which they subscribed. We think the matter proceeded no further than that the defendants had offered to become partners in a projected concern, and that the concern proved abortive before the period at which the partnership was to commence. And therefore, with respect to the agency of the directors, which is the legal consequence of a partnership completely formed, we think the directors proceeded to act before they had authority from these defendants; for, they began to act in the name of the whole before little more than half the capital was subscribed for, or half the shares were allotted. The persons, therefore, who contracted with the directors, must rest upon the security of the directors who made such contract, and of those subscribers who, by executing the deed, have declared themselves partners, and of any who have by their subsequent conduct recognised and adopted the acts and contracts of the directors; but they have not the security of the present defendants, who are not proved by the evidence to stand in any one of such predicaments.

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It is unnecessary to advert to any of the cases that have been referred to, each of which must rest upon its own peculiar circumstances; except, that, with respect to *Per-ring v. Hone*, decided in this Court, we think it right to observe, that the great point, whether there was a partnership or not, does not appear to have been made the prominent subject of argument, but to have been rather assumed than disputed; for, the advertisement or prospectus was not brought to the attention of the Court, nor is there any argument upon the terms of it. It is not incompatible with that determination, that the Court might have held the proof of partnership incomplete, if the same materials had been brought before them which are presented to us.

Upon the view which we have taken of the two first questions in this case, it becomes unnecessary to give any opinion upon the third, as to the divesting of the liability of any of the defendants by the sale of their scrip before this contract was entered into.

On the whole, therefore, we make the rule absolute for setting aside the verdict for the plaintiffs, upon the broad ground, that we do not think, that, under the circumstances proved, the directors had any authority to bind these defendants by the contract upon which this action is founded.

Rule absolute (a).

(a) The cause was again tried before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall*, after *Trinity* Term, 1831, when the Jury returned a verdict for the defendants. In *Michaelmas* Term following, a rule *nisi* for setting

aside that verdict was obtained, and in the course of the Term came on for argument. The Court took time to consider.

See also *Doubleday v. Muskett* and *Lousada*, *post*, p. 750.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN MICHAELMAS TERM,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

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IN the course of the last vacation, *William Horne* and *John Williams*, Esquires, were respectively appointed Attorney and Solicitor-General to her Majesty.

During the ensuing term—

Lord *Lyndhurst* having resigned the *Great Seal*, he was succeeded in the office of Lord High Chancellor of *England*, by *Henry Brougham*, Esq., who was raised to the peerage of the United Kingdom, by the name, style, and title of Baron *Brougham and Vaux*, of *Brougham*, in the county of *Westmoreland*. His Lordship took his seat in the Court of *Chancery*, on *Thursday*, the 25th of *November*.

Mr. Justice *Bayley*, one of the Judges of the Court of *King's Bench*, was removed to the Court of *Exchequer*; and *William Elias Taunton*, Esq., *John Patteson*, Esq., and *Edward Hall Alderson*, Esq., were called to the de-

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gree of the Coif, on which occasion they gave rings with the motto—*Nec temere nec timide*. They shortly afterwards received the honor of knighthood, the two former on their appointment as Judges of the Court of *King's Bench*, the latter as Judge of the Court of *Common Pleas*.

Sir *James Scarlett*, his Majesty's Attorney, and Sir *E. B. Sugden*, his Majesty's Solicitor-General, resigned their respective offices, and were succeeded by *Thomas Denman*, Esq., late Common Serjeant of the city of *London*, and *William Horne*, Esq., late her Majesty's Attorney-General: and *John Williams*, Esq., was thereupon appointed Attorney-General, and *C. C. Pepys*, Esq., Solicitor-General to her Majesty, the Queen.

John Heath, Esq., was also called to the degree of the coif. He gave rings with the motto—" *Metuit qui sperat*."

In the vacation after this term, *Thomas Coltman*, Esq., was appointed one of his Majesty's Counsel learned in the law; and the Honorable *C. E. Law* was elected to the office of Common Serjeant of the city of *London*, vacant by the promotion of Sir *Thomas Denman*.

Monday,
Nov. 8th.

TREGONING, Assignee of JENNER and SOPPETT, Bankrupts,
v. ATTENBOROUGH.

The defendant, a pawnbroker, advanced 200*l.* upon a deposit of silks, entering the transaction in his books as several dis-

tinct loans of sums each not exceeding 10*l.*, in order to obtain the larger rate of interest allowed by the Pawnbrokers' Act. In trover by the assignee of the owners of the goods, it was left to the Jury to say, whether the goods had been deposited with the defendant upon a contract for the payment of more than 5*l. per cent.* interest. The Jury having returned a verdict for the plaintiff, on the ground of usury—The Court refused to set it aside.

THIS was an action of trover, brought by the assignee of Messrs. *Jenner & Soppett*, silk-mercens, to recover from the defendant, a pawnbroker, the value of certain silks pledged with the latter by the bankrupts.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall* after last *Trinity* Term. The evidence was as follows:—In *November*, 1827, the bankrupts, being in difficulties, obtained from the defendant a loan of 200*l.* on a deposit of silks; and, in the month of *January* following, a further advance of 200*l.* upon other goods. Upon the occasion of the second loan, the bankrupt *Soppett* gave the defendant a receipt for the 200*l.*, and an invoice for the goods as for goods sold. The first loan was entered by the defendant in his books as loans of several distinct sums, each not exceeding 10*l.*, in order thereby to obtain the larger rate of interest given by s. 2 of the Pawnbrokers' Act, 39 & 40 *Geo.* 3, c. 99—*vis.* three pence *per* pound *per* month; but no duplicates were given to the bankrupts.

On the part of the plaintiff, it was contended that the transaction was usurious, and intended to evade the provisions of the Pawnbrokers' Act. For the defendant, it was submitted that he was acting fairly in pursuance of the statute; and that there was no evidence of any direct stipulation for more than 5*l. per cent.* interest, as between the plaintiff and defendant.

His Lordship left it to the Jury to say, whether the goods had been deposited with the defendant upon a contract for the payment of more than 5*l. per cent.* interest. The Jury returned a verdict for the plaintiff, on the ground of usury.

Mr. Serjeant *Andrews* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial had.—There was no evidence to shew that there was any usurious contract in this case. At all events, according to the doctrine of *Fitzroy v. Gwillim* (a), before the plaintiff can be entitled to relief from the contract, he must tender the money really advanced by the defendant.

(a) 1 Term Rep. 153.

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[Lord Chief Justice *Tindal*.—The case of *Fitroy v. Gaillim* has been looked at with doubt very many times, and, I think, actually over-ruled.]

The principle there laid down was acted upon in this Court, in the case of *Hindle v. O'Brien* (a), where the Court refused to set aside a judgment and execution entered up on a warrant of attorney given for an usurious consideration, but upon the terms of the defendant repaying the principal and interest. Mr. Justice *Heath* there said: "This is an application to the equitable jurisdiction of the Court, to get rid of a warrant of attorney which is good at law. The party applying must therefore do that which is equitable." And Mr. Justice *Chambre* said: "This is an application to the equitable jurisdiction of the Court, and the Court will compel the party applying to do what is equitable; which is, to pay the money that has been really advanced, with legal interest."

[Mr. Justice *Gaselee*.—Does not the fact of that case being an application to the *equitable* jurisdiction of the Court, afford an answer to the argument?]

[Lord Chief Justice *Tindal*.—Trover is a strict *legal* action.]

LORD CHIEF JUSTICE TINDAL.—It seems to me that it was strictly and solely the province of the Jury to decide as to the real nature of the contract proved. I left it to them to say whether the goods had been delivered upon a contract for a higher rate of interest than that allowed by law. The Pawnbrokers' Act is out of the question: that merely reaches to advances not exceeding 10%. The only question therefore is, whether it is competent to a pawnbroker to split a gross sum into several small sums, in order to receive a larger compensation for a loan. The Jury have found that such was the intention of the parties in making

(a) 1 Taunt. 413.

this contract; and I am of opinion that their verdict ought not to be disturbed.

With respect to the second point, the case of *Fitzroy v. Gwillim* has been cited, as having held that a party cannot entitle himself to relief from an usurious contract by a civil remedy (as, by maintaining an action of trover), unless he tender all the money really advanced. It seems to me that that case can hardly be supported: according to the concurrent testimony of *Westminster-Hall*, it was hastily decided. The statute 12 *Anne*, st. 2, c. 16, (the last statute upon this subject) provides that all bonds, contracts, and assurances for payment of any principal or money to be lent, or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred, shall be utterly void. The goods, therefore, were delivered upon a contract void in law.

Mr. Justice PARK.—This is an attempt to evade the Pawnbrokers' Act. In *Cowie v. Harris* (a), where a pawnbroker received a parcel of goods on one day, and on that and several subsequent days advanced sums of money, each not exceeding 10*l.*, as on different parts of the parcel, and received pawnbrokers' interest of three pence in the pound *per* month on those sums, Lord *Tenterden* held that it was a question for the Jury, whether this really was one transaction, and a mere contrivance for obtaining the higher interest on the whole sum, in which case it was void; or, whether the advances were really distinct.

Mr. Justice GASELEE.—The question of fact was properly left to the Jury. The case of *Fitzroy v. Gwillim* has always struck me as being a very extraordinary decision

(a) 1 Mood. & Malk. 141.

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Mr. Justice BOSANQUET.—I concur with the rest of the Court in thinking that there is no ground for disturbing this verdict. In trover, the strict legal title of the property is in question. I think there can be no doubt but that the transaction was usurious and void.

Rule refused.

Monday
Nov. 8th.

PITT v. The Sheriff of MIDDLESEX, in the cause of
HAMILTON v. JONES, PITT, and Another.

The statute 28 Geo. 2, c. 28, s. 1, enacts, that no Sheriff, &c., shall carry any person by him arrested to prison within twenty-four hours from the time of the arrest, unless the party arrested *shall refuse* to be carried to some safe and convenient dwelling-house of his own nomination, within a city, &c., other than the dwelling-house of the party himself, and within the county, &c., or liberty in which the person was arrested:—
Held, that the omission of the party to name such dwelling-house entitled the officer to carry him direct to prison.

MR. PITT (in person) moved for an attachment against the Sheriff of *Middlesex* for an alleged infraction of the statute 32 Geo. 2, c. 28, s. 1, by which it is enacted—
“That no Sheriff, &c., or other officer or minister, shall carry any person by him arrested to any gaol or prison within four-and-twenty hours from the time of such arrest, unless such person or persons so arrested *shall refuse* to be carried to some safe and convenient dwelling-house of his, her, or their own nomination or appointment, within a city, borough, corporation or market town; so as such dwelling-house be not the house of the person arrested, and be within the county, riding, division, or liberty in which the person under arrest was arrested.” The affidavit merely alleged that the officer had taken Mr. Pitt immediately to the *Fleet* Prison, omitting to state that the prisoner had named any safe and convenient dwelling-house to which he required the officer to carry him, as mentioned in the statute.

Per Curiam.—The defendant *Pitt* has not brought himself within the provision of the Act. He should have named some safe and convenient dwelling-house, within the liberty in which he was arrested, whither the officer was to

convey him. How otherwise could the officer judge of the safety or convenience of the place?

Rule refused.

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MIDDLESEX.

IMPERIAL GAS COMPANY v. CLARKE and Others.

Monday,
Nov. 8th.

THIS was an action on the case against the defendants for misconduct alleged to have been committed by them in the capacity of directors of the Imperial Gas Company. The misconduct charged consisted in the making of several false entries in the books of the company, and false returns to the quarterly meetings, whereby the managers of the company were induced to declare larger dividends upon the shares of its members than were warranted by the true state of their funds.

The defendants were sued as directors of an incorporated company, for mismanagement of the company's affairs. The Court refused to allow them to inspect the books kept by the company during the period of their directorship, the affidavit of the motion not stating such inspection to be material or necessary to their defence to the action.

The declaration not disclosing the nature of the entries and returns complained of, and no particulars having been delivered in the cause—

Mr. Serjeant *Taddy*, on the part of the defendants, in the course of the last term, obtained a rule *nisi*, that the defendants might be at liberty to inspect the books of the company, and take copies therefrom.

Mr. Serjeant *Wilde* and Mr. Serjeant *Adams* now shewed cause.—The affidavit in support of the motion discloses no necessity for the inspection prayed; and the application is far more extensive than is warranted by the practice of the Court upon this subject. In *Rowe v. Howden* (a), which was an action by the owners of a ship against a broker employed by them to procure a cargo, the Court refused to order the latter to allow the former

(a) *Ante*, Vol. 1, p. 334; S. C. 4 Bing. 539.

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to inspect and take a copy of a letter received by him from a correspondent abroad, as far as it related to the plaintiffs' ship, although he acted as such broker at the time. In *Rundle v. Beaumont* (a), in an action for freight and demurrage, by ship-owners against the charterer, the Court refused to grant the latter an inspection of the log-book kept during the voyage. In *Ratcliffe v. Bleasby* (b), Lord Chief Justice *Best* says (c): "The established principle on which the Courts have acted is, that they will not direct a party to the suit to produce a deed in his custody, unless the applicant shew that such person holds it as a trustee."

Mr. Serjeant *Taddy* and Mr. Serjeant *Andrews*, in support of the rule.—The declaration charges the defendants, as directors of the company, with misconduct in their character of directors. The cases cited cannot apply, this company being a body corporate, the members of which are entitled to the inspection of all books, for the purpose of seeing the entries and minutes made therein during the period that they continued members; and all that these defendants ask is, that they may be permitted to inspect the entries made in the books of the company during the time at which, as appears upon the record, they were directors.

On the part of the plaintiffs, it was proposed that a letter that had been sent by their attorney to the defendants, detailing the specific charges made against them, should be deemed tantamount to a regular particular of demand; and that an explanation should be given of an item objected to—*vis.* "Sundry accounts debtor to Coke, 6,700*l.*"

(a) *Ante*, Vol. 1, p. 396; S. C. 3 Bing. 148.
 4 Bing. 537.

(c) 10 J. B. Moore, 526.

(b) 10 J. B. Moore, 523; S. C.

Lord Chief Justice TINDAL.—It seems to me that the defendants have not by their affidavit brought themselves within the rule acted upon in this Court with regard to the inspection of books and papers in the possession of an adverse party. The general rule is, that one side shall not be permitted to get at the evidence of the other side. There are, however, exceptions to that rule. In the case of corporations, parties have been allowed to inspect the corporate books and bye-laws, on the ground that they have an interest in them. In the present case, the defendants have not shewn that they are unable to go on with their defence without the inspection they ask. They should, at all events, shew that there is something in these books material to their defence. I am particularly desirous not to extend the rule by which one party is enabled to pry into the case of the other. On the terms proposed, I think the rule should be discharged.

The rest of the Court concurring—

Rule discharged accordingly.



WAYMAN v. HILLARD.

Tuesday,
Nov. 9th.

THIS was an action of *assumpsit* by an out-going against an in-coming tenant. The two first counts of the declaration set forth a special agreement, by which it appeared that the defendant had agreed to allow the plaintiff for all crops sown before a certain day. There was also a count upon an account stated.

Mr. Justice *Littledale*, before whom the cause was tried, at the last Assizes for the county of *Cambridge*, having directed the Jury to find for the defendant upon the special

The plaintiff demanded from the defendant 40*l.*, alleged to be due upon an agreement between them as out-going and in-coming tenant. The defendant offered 17*l.*:—*Held*, not sufficient evidence to support a count upon an account stated.

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counts, the proof thereof failing, it was contended, on the part of the plaintiff, that an offer made by the defendant to pay a sum of 17*l.* in lieu of 40*l.* demanded by the plaintiff, amounted to an admission that so much was due, and was therefore evidence to support the account stated.

The learned Judge, however, thought this not sufficient; and the Jury accordingly returned a verdict for the defendant.

Mr. Serjeant *Storks* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial had, on the ground of misdirection.—He referred to the case of *Knowles v. Mitchel*(*a*), where an admission by a defendant, that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, was held to be sufficient to support a count upon an account stated, though not for goods sold and delivered—Lord *Ellenborough* saying: “If there were an acknowledgment by the defendant of a debt due upon any account, it was sufficient to enable the plaintiff to recover upon the count for an account stated.”

Lord Chief Justice TINDAL.—It seems to me that, in acceding to the argument urged on the part of the plaintiff, we should be carrying the doctrine of account stated much further than it has ever before been carried. In the case cited, the admission of the defendant had express reference to the trees that had been felled and taken away by him. Here, however, there does not appear to have been any reference to any item of an account, or to any contract between the parties. All that appears is this, that, on a demand being made by the plaintiff of 40*l.*, the defendant said that that sum was not due, but offered to pay 17*l.* The case seems rather to range itself

(*a*) 13 East, 248.

under the class of cases touching the payment of money for the purpose of avoiding litigation.

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Mr. Justice PARK.—To support an account stated, there must be an absolute acknowledgment by the party to be charged. All that appears in this case is, that there was a dispute between the plaintiff and defendant, and that the latter offered to pay a certain sum; which offer was not accepted. That clearly was no acknowledgment of a debt, but a mere attempt to purchase peace.

Mr. Justice GASELEE.—It is impossible to support an account stated, except upon an account mutually agreed on between the parties. The very language of the count is sufficient to prove this. In *Knowles v. Mitchel*, the question arose upon a single sum of 13*l.*, and it was contended that there could not be an account stated where the demand consisted of only one item; but, inasmuch as it had been agreed between the parties that a certain sum was due, the Court held that the account stated might be sustained. In *Higmore v. Primrose* (a), proof of the acknowledgment of one item of debt only was held to be good to support a count upon an account stated. Mr. Justice *Holroyd* there said: “It has been held, that, upon a count for goods sold and delivered, the plaintiff may prove the sale of one article, and that will be well enough. The same rule applies to this count, which is ‘of and concerning divers sums,’ as to the count for goods sold. If the count be good, it is enough if the plaintiff prove any part of it.” It therefore seems to me to be too much to say that the transaction proved in this case amounted to an account stated between the parties.

Mr. Justice BOSANQUET.—The Court do not mean to

(a) 5 Mau. & Selw. 65.

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controvert the principle that an absolute acknowledgment of a debt may suffice to support an account stated. But here, no such absolute acknowledgment has been shewn. The evidence only amounts to this, that, when the plaintiff made a demand upon the defendant for 40*l.*, which he alleged to be due to him, the defendant, to preserve himself from litigation, offered to give the plaintiff 17*l.*; an offer which the plaintiff does not appear to have accepted. The rule must therefore be refused.

Rule refused.

Tuesday,
Nov. 9*th*.

BROAD v. THOMAS.

The plaintiff, a broker, being employed by the defendant to obtain freight for a vessel, entered into an agreement for a charter-party with one *E.* The defendant refused to ratify the contract:—*Held*, that the plaintiff was not entitled to commission.

THIS was an action of *assumpsit* for work and labour by the plaintiff, as a ship-broker, in procuring freight for the defendant's ship.

At the trial before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall* after the last term, it appeared that the plaintiff had been authorized by the defendant to act as his broker, for the purpose of procuring freight for the ship *Betsy*, belonging to the defendant, for a voyage to the *Canary* Islands and back; and that the plaintiff had accordingly entered into an agreement for a charter-party with one *Emlin*; but that the defendant had refused to ratify the contract. The plaintiff thereupon brought this action to recover the customary commission payable to a broker for *procuring* a freight.

Several witnesses were called on either side to speak to the custom. The witnesses for the plaintiff stated the usage among merchants to be, that the broker was entitled to his commission upon his procuring a freighter, whether the ship-owner thought proper to accept the freight or not. Whilst those called for the defendant stated that

the commission was not payable unless a charter-party was actually entered into, or freight accepted.

His Lordship thereupon left it to the Jury to determine the custom upon this conflicting evidence; telling them that the plaintiff's right to recover depended upon the custom, for that independently of the custom he was not entitled to maintain the action, the defendant having a right to exercise his discretion, and inquire into the solvency of the proposed charterer.

The Jury (negating the custom) found for the defendant.

Mr. Serjeant *Taddy* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial had.—He contended that the question as to the custom was not the proper one to be submitted to the Jury; and that, after the plaintiff had procured a charterer, the defendant had no right arbitrarily to refuse to go on with the negotiation, and thus deprive the plaintiff of his remuneration: and he cited the case of *Hamond v. Holiday* (a), as laying down the rule upon this subject, arguing that this case was not within that rule.

Lord Chief Justice TINDAL.—It seems to me that, if this cause were to go down again to trial, it must still be left to the Jury on the question of custom. The broker's commission affords a very large remuneration for his trouble in procuring freights. It is probably for this reason customary not to charge commission for an abortive negotiation.

Mr. Justice PARK.—The question as to the custom was

(a) 1 Car. & Payne, 384, where it was laid down by Lord Chief Justice *Bent*, that a broker cannot recover commission, or even a compensation for his trouble, if he executes his duties in such a manner that no benefit can result therefrom.

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the only one that could have been left to the Jury; and their verdict is conclusive.

The rest of the Court concurring—

Rule refused.

Tuesday,
Nov. 9th.

SAYER, Assignee of CORT, a Bankrupt, v. GARNETT.

A bankrupt can not be called as a witness either to support or to defeat the commission, or even to explain a doubtful act, which might or might not be an act of bankruptcy.

THIS was an action of *assumpsit* tried before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall* after the last term.

The act of bankruptcy sought to be established by the plaintiff was this:—On the 17th *July*, 1829, the bankrupt had made an appointment to call on the plaintiff (a creditor). On that day he was met by the witness, who asked him if he had called upon the plaintiff; when the bankrupt answered, that “he had gone out of his way to avoid Mr. *Sayer*, as he was ashamed to see him, his affairs being in such a bad state.”

On the part of the defendant, it was proposed to call the bankrupt, to explain his reason for not going down the particular street in which his creditor lived. It was objected, for the plaintiff, that his evidence was not admissible. For the defendant, it was contended, that the bankrupt might be called to defeat the commission, though he could not be called to support it.

His Lordship, however, rejected the testimony of the bankrupt; and a verdict was found for the plaintiff.

Mr. Serjeant *Taddy* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial had, on the ground that the evidence of the bankrupt had been improperly rejected.—In *Oxlade v. Perchard*, Sheriff of Lon-

don (a), Lord *Kenyon* held a bankrupt to be an admissible witness to explain a doubtful act, which might or might not be an act of bankruptcy—whether an arrest relied upon as a concerted and fraudulent one, was so or not. His Lordship said, “that it certainly was a principle of law, that a bankrupt could not be called to prove an act of bankruptcy committed by himself; but that the converse of that had never been decided, that a bankrupt could not be called to disprove it, as, to explain a doubtful or equivocal act; that the reason why a bankrupt could not be called to prove an act of bankruptcy committed by himself was, that it was a criminal act in the eye of the law: that it had been decided in a modern case, that the declaration of a bankrupt [made at the time] was admissible evidence to prove *quo animo* he had left his house, his absconding being relied upon as the act of bankruptcy (b); and that he was therefore of opinion that, in that case, the bankrupt was an admissible witness to prove whether the arrest was a concerted one or an adverse one.” In *Hoffman v. Pitt* (c), Lord *Ellenborough* held the contrary. In that case, there was a deed of assignment by the bankrupt, which was alleged to be an assignment of all his property, and consequently an act of bankruptcy. On the part of the defendant, it was suggested that this deed was not an act of bankruptcy; that in fact it did not convey the whole of the bankrupt’s property, but was an assignment of a part only, given as a security and given *bond fide*: and, to prove this, the bankrupt was called. He was asked by the counsel for the defendant, if the assignment did or did not comprise the whole of his property, or whether he had any other property of any description, except what was contained in that deed. This was objected to, on the part of

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(a) 1 Esp. Rep. 287.

Rep. 512.

(b) His Lordship alluded to the case of *Bateman v. Bailey*, 5 Term

(c) 5 Esp. Rep. 22.

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the plaintiff, as being virtually calling him to prove or disprove his own act of bankruptcy; it being an act of bankruptcy or not as the effects turned out to be or not to be the whole of his property; and that a bankrupt could not be asked to any thing affecting his act of bankruptcy, which this was. The defendant's counsel contended, that a bankrupt may be called to explain a doubtful act, which might or might not be an act of bankruptcy, to explain *quo animo* it was done. But Lord *Ellenborough* said: "To allow this would go the length of taking the sting out of the transaction which is to constitute the act of bankruptcy. He might be asked in the same way, did he give orders to have himself denied. It goes to defeat the act of bankruptcy; and, by a similar mode, it could be made a mode of proof of the bankruptcy. It cannot be admitted." These, however, are mere *Nisi Prius* decisions. There are several cases *in banc* to shew that the bankrupt cannot be called to prove an act of bankruptcy, or the debt of the petitioning-creditor, or any other matter to support the commission (a). In *Morgan v. Pryor*, Lord Chief Justice *Abbott* said (b): "A rule has been long established, that a bankrupt cannot give evidence to prove any fact necessary to give validity to the commission." Mr. Justice *Bayley* said: "It appears to me, that the rule was founded upon the principle of interest in the bankrupt." And Mr. Justice *Holroyd* said: "The general rule is, that a witness is competent unless interested in the event of the suit; and the criterion as to that is, whether the verdict can be given in evidence, either for or against him, in any other proceeding. Here, the verdict would not be evidence either for or against the bankrupt; he is not, therefore, within the general rule. But there are a few anoma-

(a) See *Chapman v. Gardner*, 2 Barn. & Cress. 14—*Sanderson v. H. Blac.* 279—*Flower v. Herbert*, *Laforest*, 1 Carr. & Payne, 46.
Ibid., note—*Morgan v. Pryor*, 2 (b) 2 Barn. & Cress. 17.

lous cases in which that criterion is not decisive as to the admissibility of a witness; and accordingly it has been held, that, in an action by assignees, although the bankrupt may be a witness for other purposes, yet he cannot prove the act of bankruptcy, trading, or petitioning-creditor's debt, because those circumstances are necessary, not only to the action, but to the commission itself. The case of *Chapman v. Gardner* shews that the bankrupt was considered interested in proving each of those facts, lest proceedings should be had to supersede the commission; and for that reason he was considered as incompetent." *Binns v. Tetley* (a) is the only authority *in banc* upon this express point. At the trial of that cause, Mr. Justice *Bayley* ruled that the bankrupt (who had been examined in chief to increase the fund) could not be cross-examined to any fact tending to defeat the commission. The case afterwards came before the Court of *Exchequer*, on a motion for a new trial, on the ground that the evidence had been improperly rejected. Mr. Baron *Graham* said: "In this case, which is one, perhaps, of very considerable importance, I should have thought the argument for opening the mouth of the bankrupt upon the particular subject perfectly convincing on principle derived from the case of *Bent v. Baker* (b), and those cases which have followed it upon the competency of witnesses. I should have said that it was quite clear he should answer the question, because the event of the suit would not in any way affect him. But unfortunately there are authorities which have impressed on my mind an opinion, expressed by Lord *Ellenborough* in the case cited from *Starkie* (c), that a bankrupt who has obtained his certificate, and released his interest, is compe-

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(a) 1 M'Clel. & Younge, 397.

(b) 3 Term Rep. 27.

(c) *Reed v. James*, 1 Stark. Rep. 134, where his Lordship observed,

that "the rule" respecting the admissibility of the bankrupt "is restricted to evidence affirming or disaffirming the bankruptcy."

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tent to prove every thing relating to the bankruptcy, with the exception of any matter tending either to sustain or to defeat the commission, without distinction. The case is an anomaly, an exception to a general rule, like the excluding the testimony of the person whose name has been forged, in a prosecution for forgery. And if this be really the law of the case, having decisions to that effect before my eyes, and being called upon to give an opinion on this point, I cannot but feel myself governed by them." Mr. Baron *Garrow* said: "I do not know how to get over the authorities which distinguish the general right of examining the bankrupt from the power of questioning him as to any fact necessary to support or impeach the bankruptcy. Under the pressure of all these authorities, I feel myself bound to say that the learned Judge's opinion was correct." And Mr. Baron *Hullock* said: "I am of the same opinion; and I regret to say that I am bound to arrive at it upon authorities which I do not feel myself strong enough to set aside. There is no doubt that if the point that has occurred were *res nova*, *Bent v. Baker* and *Smith v. Prager* (a) would be decisive authorities that the bankrupt would be a competent witness. In *Morgan v. Pryor*, I think one of the Judges admits that the cases of the bankrupt's incompetency are anomalous. But I fear that the decided cases leave the present almost without argument. I had occasion to consider this subject in the case of *Smallcombe v. Bruges* (b); and certainly, if it were *res integra*, I should entertain a different opinion from that which I do. But the point has been already determined on different occasions. In *Hoffman v. Pitt*, the act of bankruptcy was an assignment, as it is here. It was proposed to ask the bankrupt whether it did or did not comprise the whole of his property, that is, whether it did or did not constitute an act of bankruptcy; but Lord *Ellenborough* held, precisely as was ruled here, that the question could not be put. In

(a) 3 Term Rep. 7, 60.

(b) M'Clel. 45.

Reed v. Jones, though he allowed the particular question to be asked, yet he admitted the rule which is now insisted on; for he says—‘the rule is restricted to evidence affirming or disaffirming the act of bankruptcy.’” The whole Court in that case seem to have very reluctantly admitted the rule laid down in the *Nisi Prius* cases above referred to.

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Lord Chief Justice TINDAL.—The universal understanding of the profession of a rule of law generally laid down in the text books, ought not to be lightly over-ruled. I am clearly of opinion that a bankrupt is not admissible as a witness either for the purpose of supporting or of defeating the commission against him. It by no means appears to me to be a necessary consequence of the rule prohibiting his being called in support of the commission, that he may be called for the purpose of defeating it. It is true that he has to a certain extent an interest in supporting the commission, inasmuch as he may be benefited by obtaining his certificate of conformity. But, has he not also an interest in defeating it, where it is his object and wish to do so? In the case of *Binns v. Tetley*, in the Court of *Exchequer*, it was expressly held that a bankrupt who has been examined in chief, to increase the fund, in an action by his assignee, cannot be cross-examined to any fact tending to defeat the commission. He cannot surely, then, be called directly for that purpose. See the mischief that would result from the admission of such a doctrine. The bankrupt would often be called to make statements of facts, the knowledge of which must necessarily be confined to himself, and which therefore could not be rebutted, and thus the proceedings under many commissions would be rendered insecure (b). The practice I have above stated having long been the understood law of *West-*

(a) But see the case of *Cook v. Rogers* (*post*, Vol. 5, p. 353), where the bankrupt was permitted to give evidence explanatory of the motives by which he was actuated in making a payment to a particular creditor.

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minster-Hall, and there having been one decision of a Court of law in support of it, I am not now disposed to impugn it.

Mr. Justice PARK.—I am of the same opinion. I recollect that Lord *Kenyon's* decision in *Oxlade v. Perchard* was very much questioned at the time; and his Lordship afterwards changed his opinion upon the subject. Undoubtedly, the bankrupt has an interest in defeating, as well as in supporting the commission against him. The general understanding of the profession has always been, that he cannot be called for the purpose of defeating the commission. In *Elsom v. Brailey* (a) it was laid down that a bankrupt cannot be a witness to prove any fact necessary to support the commission; and that it is immaterial whether a question for such purpose be asked upon examination in chief or cross-examination: it is equally improper in both cases. In *Binns v. Tetley*, Mr. Justice *Holroyd* says: "They are only *Nisi Prius* cases on which the Court now founds itself; but every Judge in *Westminster-Hall*, I believe, will be found to have adopted them in practice, not because they are *good* decisions, but because they *are* decisions."

Mr. Justice GASELEE.—With the sole exception of *Oxlade v. Perchard*, the general understanding of *Westminster-Hall* has been, that a bankrupt cannot be examined either for the purpose of supporting the commission against him, or for that of defeating it.

Mr. Justice BOSANQUET.—I am also of opinion that the rule prayed should not be granted; the only effect would be the calling in question a long and established course of practice, which appears to me to be conclusive.

Rule refused.

(a) 1 Selwyn's *Nisi Prius*, 8th edit. 263.

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FOSTER and Another v. CHARLES.

Wednesday,
Nov. 12th.

THIS was an action on the case, wherein the plaintiffs charged the defendant with falsehood and fraud in certain representations made by him to them as to the character of one *Jacque*, whom the plaintiffs were about to take into their employ on the recommendation of the defendant; and also for the false and fraudulent concealment of what the defendant knew of the character and circumstances of *Jacque*, and ought to have communicated to the plaintiffs (a).

Plea, the general issue.

At the trial before Lord Chief Justice *Tindal*, at the sittings at *Guildhall* after the last term, his Lordship told the Jury it was for them to say, from the evidence before them, whether the defendant had made the representations in question, knowing them to be false, with a design to benefit himself or a third person, in either of which cases he told them that the defendant was liable for the damage sustained by the plaintiffs in consequence of such representations; and that, although the defendant had no intention to benefit himself by the statement he made, yet he was guilty of fraud in the legal acceptance of the term, and answerable in damages, provided those statements were false within his knowledge at the time, and the plaintiffs received injury therefrom.

The Jury returned a verdict for the plaintiffs for 823*l.*, the amount of damage proved; but at the same time stated

In an action on the case for false representations made by the defendant to the plaintiffs, touching the character and circumstances of an agent or traveller he was desirous of recommending to them, and of the fraudulent concealment of facts within his knowledge, and which he ought to have communicated to the plaintiffs, the Judge, in substance, told the Jury, that, if the defendant made the representations knowing them to be false, and injury resulted therefrom to the plaintiffs, he was guilty of fraud in the legal acceptance of the term, and answerable in damages, although he made the representations without any design to benefit himself thereby.

The Jury returned a verdict for the plaintiffs, accompanying it with this statement:—"We consider that there was no fraudulent intention on the part of the defendant, though that which he has done legally constitutes a fraud." The Court held that the action lay, and refused to enter the verdict for the defendant on this finding.

(a) See the pleadings and the statement of facts on a former trial, *Ante*, Vol. 4, p. 61.

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that they wished it to be understood that there was no fraud on the part of the defendant.

His Lordship thereupon asked them whether they were of opinion that the representations made by the defendant as to the character and circumstances of *Jacque* were false, and whether they thought that the defendant knew them to be false at the time of making them.

The foreman of the Jury answered—"We consider that there was no fraudulent intention on the part of the defendant, though that which he has done legally constitutes a fraud."

Mr. Serjeant *Jones*, on the part of the defendant, now moved that the verdict might be entered for the defendant, on the ground that it was in effect a verdict of not guilty; or that a new trial might be had, on the ground of misdirection.—If a party, from inadvertence, make a false statement, he is clearly not liable for the consequences resulting from such false statement. *Haycraft v. Creasy* (a). But, if the statement be made with intent to deceive, he is liable. The present case is equally removed from both these positions: it is a false statement (or a concealment of facts touching the character and circumstances of the party recommended, which ought to have been communicated), *without any intent to deceive the plaintiffs*. There is no authority in law to shew that mere falsehood, devoid of an intent to defraud, is the ground of an action.

[Lord Chief Justice *Tindal*.—Are not the cases you are about to cite exceptions to the general rule? *Exceptio probat regulam*.]

This action came in lieu of the old writ of deceit. In *Pasley v. Freeman* (b), Mr. Justice *Buller*, in his judgment,

(a) 2 East, 92.

(b) 3 Term Rep. 51, where it was held that a false affirmation made by the defendant with in-

tent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of action upon the case in the nature of de-

goes very fully into the question. He says (a): "The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs. And the question is, whether an action thus founded can be sustained in a Court of law. Fraud without damage, or damage without fraud, gives no cause of action; but, where these two concur, an action lies. I agree that an action cannot be supported for telling a bare naked lie; but that I define to be, saying a thing which is false, *knowing* or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person." In *Haycraft v. Creasy*, an affirmation of knowledge which the party did not possess, was held not to be actionable (b). Mr. Justice Lawrence there said (c): "I have always understood the doctrine laid down in *Pasley v. Freeman* to be, that without fraud there was no cause of action. I collect that from the opinion delivered by each of the Judges who concurred in that

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ceit; and that, in such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

(a) Ibid. 56.

(b) The note of that case is as follows:—To an inquiry concerning the credit of another who was recommended to deal with the plaintiff, a representation by the defendant that the party might safely be credited, and that he spoke this from *his own knowledge*, and not from hearsay, will not sustain an action on the case for damages, on account of a loss sus-

tained by the default of the party, who turned out to be a person of no credit—provided it appear that such representation was made by the defendant *bonâ fide*, and with a belief of the truth of it; for, the foundation of the action is fraud and deceit in the defendant, and damage to the plaintiff by means thereof: and, taking the assertion of knowledge *secundum subjectam materiam*, viz. the credit of another, it meant no other than a strong belief founded upon what appeared to the defendant to be reasonable and certain grounds.

(c) 2 East, 106.

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judgment. If this case had gone to the Jury on the ground of fraud, I cannot say there would have been no evidence to support the verdict: but the case went to them on the ground, that, though the defendant were himself a dupe, yet, if the representation made by him were false, he was answerable. Then the question is, whether, if a person assert that he knows such an one to be a person of fortune, and the fact be otherwise, although the party making the assertion believed it to be true, an action will lie to recover damages for an injury sustained in consequence of such misrepresentation. It does not appear that any of the Judges went this length in *Pasley v. Freeman*. In order to support the action, the representation must be made *malò animo*. It is not necessary that the party should gain or intend to gain any thing for himself by it; but, if he make it with a malicious intention that another should be injured by it, he shall make compensation in damages. But there must be something more than misapprehension or mistake." In *Eyre v. Dunsford* (a), Mr. Justice Grose said: "It has been already decided, in *Pasley v. Freeman*,

(a) 1 East, 318. The defendant having had a credit lodged with him by a foreign house in favour of one *W. T.* to a certain amount, upon an express stipulation that *W. T.* should previously lodge in his hands goods to treble the amount; and, being applied to by the plaintiffs for information touching the responsibility of *W. T.*, answered that he knew nothing of *W. T.* himself but what he had learned from his correspondent; but that *he had a credit lodged with him for so much by a respectable house at Hamburg, which he held at W. T.'s disposal (omitting the condition), and that, upon a view of all the circumstances*

which had come to his (the defendant's) knowledge, the plaintiffs might execute W. T.'s order with safety; viz. an order for the sale and delivery of goods on credit. In an action on the case to recover damages incurred by the plaintiffs in consequence of having trusted W. T. on this representation—it was held that there was a material suppression of the truth, and evidence sufficient for the Jury to find fraud, which is the gist of the action; although the defendant had no immediate interest in making the false representation; and although, at the time when it was made, he added that he gave the advice without prejudice to himself.

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that an action will lie for making a false representation of a person's character in order to deceive another who inquires for information concerning it. The action, it was there holden, is founded on fraud, *and on no other ground can it be maintained.*" In *Tapp v. Lee* (a), which was an action on the case for giving a false character to a tradesman, whereby he was induced to trust an insolvent person, the Court held that fraud was necessary to support the action. Mr. Justice *Chambre* there said: "Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood. As to the case of *Haycraft v. Creasy*, I agree with the majority of the Judges who decided the point of law. In that case there was no fraud; but *fraud is the foundation of the action*. There, the defendant himself was misled; every thing which he stated he believed; the ground of action therefore totally failed."

It is clear from all these authorities, that this verdict is in effect a verdict for the defendant. The intent of the party making the representation is parcel of the inquiry. Every Judge, in stating the rule, from the time of *Pasley v. Freeman* to the present, has laid down both falsehood and fraud to be essential and necessary to the maintaining of the action. If no intent to deceive the party to whom the representation is made were averred in pleading, the declaration would be demurrable.

Lord Chief Justice TINDAL.—It appears to me that no sufficient ground has been shewn to induce the Court to disturb the verdict given in this case. The question seems to have arisen on a misconception of the statement

(a) 3 Bos. & Pull. 367.

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made by the Jury when they found their verdict. They assessed the damages at 823*l.*, and added, that they considered that there was no fraudulent intention on the part of the defendant in making the representation upon which the action was founded, though in point of law he was guilty of fraud. Their attention had, in the summing up, been called to two motives which might be supposed to have actuated the defendant—*first*, a desire to benefit himself by the false representation—*secondly*, a desire of rendering a service to the party he was recommending: and I explained to them that the defendant was in law guilty of fraud, if he, though without any intention thereby to benefit himself, made statements that were false in fact, and false within his own knowledge, provided any injury had resulted therefrom to the plaintiffs. All that I understood the Jury to have found was, that the defendant was not actuated by the baser motive of seeking to benefit himself by the false statements he made, but merely that he was guilty of fraud in law. The question, therefore, is, whether a party who utters that which he at the time knows to be false, and thereby occasions damage to another, is not liable for the consequences of such false representation. I have heard nothing in the argument calculated to shake the opinion I entertained at the trial. It seems to me that it would be extremely dangerous to set afloat such a doctrine as that contended for on the part of the defendant. Ill disposed persons might then with impunity mislead others, seeking shelter under some motive within their own breasts. The confusion in this case has arisen from not properly distinguishing between that species of fraud which is the legal consequence of a wrongful act, and moral fraud, from the imputation of which the Jury seemed anxious to free the defendant. Although the legal result of an act which operates an injury to another may be that the party doing that act is guilty of fraud, yet it by no means follows that the act is in itself dishonest or immoral.

Upon the whole, it seems to me, that, when the statement accompanying the finding of the Jury is properly explained, the case is free from all doubt.

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Mr. Justice PARK.—I am of the same opinion. The case of *Pasley v. Freeman* created a considerable sensation at the time it was decided. Mr. Justice Grose on that occasion differed from the rest of the Court, and his opinion was afterwards held to be correct. The rule is well laid down by Mr. Justice Chambre in the case of *Tapp v. Lee (a)*, as also by my Lord Chief Justice on the former motion in this cause. It had there been insisted, on the part of the defendant, “that it was not sufficient for a plaintiff, in order to ground an action for deceit against the defendant for misrepresenting or mis-stating the circumstances or character of a third person, to shew that the representation is false within the knowledge of the party making it, and that damage has actually accrued to the person to whom it was made; but that he must also shew that the defendant was actuated by malice or some interested motive.” But, his Lordship said—“I am not aware of any authority for such a proposition, and it appears to me to be immaterial what the motive might be. The law will infer an improper motive, if a party make an incorrect or wrong statement, if such statement be shewn to be false within his own knowledge, and is proved to have occasioned a damage or injury to the person to whom it is made.” In the present instance it is manifest that the Jury merely intended to distinguish between the imputation of sordid motives in the defendant, and that which constituted a legal fraud. I am therefore of opinion that there is no pretence for disturbing the verdict.

Mr. Justice GASELEE.—It seems to me that the only

(a) 3 Bos. & Pul. 371, cited *ante*, Vol. 4, p. 70.

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possible doubt that could arise in this case is, whether this verdict was a perfect finding. Had it stood alone, there might perhaps have been some ground for doubt; but, when it comes to be explained, as my Lord Chief Justice has explained it, all doubt is removed, and the finding appears correct. That which the Jury understood by a fraudulent intention was, a sordid motive arising from personal interest: and that species of fraud they meant to negative. If, however (as is perfectly clear upon the facts of the case), the defendant intended to deceive the plaintiffs in the representations he made as to the character and circumstances of *Jacque*, and damage resulted to the plaintiffs, that is what the law calls a fraud, and is sufficient to support the action.

Mr. Justice BOSANQUET.—The obvious meaning of the finding is, that the Jury thought, that, though the defendant had been guilty of fraud in the legal acceptance of the term, still that his object was not to benefit himself thereby, but probably to do a service to the person he was recommending. But, whatever might have been his motives, he is liable for the consequences of his false representations, inasmuch as they were false within his own knowledge, and occasioned injury to the plaintiffs. There is consequently no ground for disturbing the verdict.

Rule refused.

Thursday,
Nov. 11th.

SCOTT v. LARKINS.

Holy Thursday is not a juridical day, and therefore not to be reckoned as one of the four clear days for a *sci. fa.* against bail to lie in the office.

ON a former day in this term, Mr. Serjeant *Wilde* obtained a rule *nisi* to set aside a writ of *capias ad satisfaciendum* issued in this cause, on the ground of irregularity. The irregularity complained of was, that the first writ of

scire facias (a) had not lain in the office the time required by the practice of the Court, *viz.* four clear juridical days. The writ lay from *Saturday* until the *Friday* following, the intervening *Thursday* being *Holy Thursday*.

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Mr. Serjeant *Taddy* now shewed cause upon an affidavit which stated that the office was open on *Holy Thursday* as upon any other holiday. He referred to the case of *Cresswell v. Green* (b), where it was held that an intervening *Sunday* is to be reckoned as one of the eight days in full term given to bail to render their principal after the return of the writ.

Mr. Serjeant *Wilde*, in support of his rule.—*Holy Thursday* is to all intents the same as *Sunday*. It is true that, on the former day, search may be made in the office; but that is only on payment of extra fees, which is not within the intention of the rule. *Wathen v. Beaumont* (c), and *Howard v. Smith* (d), are authorities to shew that an intervening *Sunday* is not to be reckoned as one of the four days.

Lord Chief Justice TINDAL.—The object of the rule is, that the bail should have four clear days in which to go freely to search in the office to ascertain whether any writ has been lodged in the cause against them. If it had appeared in the plaintiff's affidavit, that the office was open on *Holy Thursday* as on any other day, that might have been an answer to the motion; but it is very guardedly sworn, that the office is open on that day as upon other holidays. Now, we know that, under these circumstances,

(a) The Sheriff had been directed to return two *nils*—a practice of which the Court, upon this as well as on other occasions (see *Beddington v. Beddington*, *Ante*,

Vol. 2, p. 479), expressed extreme disapprobation.

(b) 14 East, 537.

(c) 11 East, 271.

(d) 1 Barn. & Ald. 528.

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search could only be made on payment of extra fees. The bail do not therefore seem to have been placed in the situation in which it was intended that they should be placed.

Cases of this description, where the Sheriff is directed to return two *nihilis* (doing violence to the language of the writ), ought to be watched as narrowly as possible. It is a practice that is not founded in good sense—

The rest of the Court concurring—

Rule absolute.

Friday,
Nov. 12th.

The defendants were appointed directors of a joint stock company for supplying the town of *Brighton* with water, attended meetings of the directors, and accepted and paid the first instalment upon the number of shares required to qualify them to act as directors. The resolutions entered into at the first formation of the company, and the prospectus subsequently issued, stated that an act of Parliament

DOUBLEDAY v. MUSKETT and LOUSADA.

THIS was an action of *assumpsit* for work and labour performed by the plaintiff, an excavator, for a joint-stock company which was about to be established for the supplying the town of *Brighton* with water, of which company the defendants were alleged to have been directors.

The cause was tried before Mr. Justice *Gaselee*, at the *Summer Assizes* for the county of *Sussex*, in 1829. The evidence was as follows:—

The company in question was projected in *August*, 1825. A meeting of parties desirous of becoming members was held on the 9th of *September*, in that year, for the purpose of establishing the concern, when the following resolutions were passed:—

“Resolved—That a company be formed for the better supplying with water the inhabitants of the several pa-

would be applied for to regulate and establish the company. After the defendants had ceased to attend meetings of the company, the directors advertised for tenders for the excavation of reservoirs, and employed the plaintiff to do the necessary works:—*Held*, that the defendants (they having once accepted the office of directors, and not having since done any act to divest themselves of the responsibility attached to that character) were liable to the plaintiff for the work done by him, although they were not actually parties to the contract, and although no act of Parliament for incorporating the company had been obtained.

ishes of *Brighthelmstone, Hove, Preston, Ovingdean,* and *Rottingdean*, in the county of *Sussex*, to consist of the several persons now present, and such others as shall become subscribers, subject to the regulations now and hereafter to be made—

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“That the said company be called *The Brighton Water Company*—

“That, for the purpose aforesaid, *Hollis Solly* and *E. H. Creasy*, now present, be a committee of the directors of the said company, together with Major *V. Russell*, *J. B. Lousada*, and *J. A. Muskett* (the defendants), if they accept such appointment, for the general management of the affairs of the said company—

“That *Hollis Solly*, Esq., be the chairman of the said company of directors—

“That Major *Russell* be the deputy chairman—

“That Messrs. *Tamplin & Co.* be the treasurers or bankers of the said company—

“That Mr. *George Chapman* be the clerk and solicitor of the same—

“That application to Parliament be made in the ensuing session for a bill to carry into effect the said undertaking; and that the solicitor do give the usual and necessary notices.”

The defendants consented to become directors of the company, and certain shares therein were allotted to them, upon which they paid the first instalments. The following were minutes or entries in the books of the company, of the resolutions entered into at two several meetings held on the 17th of *September*.

“Present, *Hollis Solly*, *E. H. Creasy*, Major *Russell*, *B. Gregory*, *J. B. Lousada*, *Charles Gell*, *G. A. Muskett*, *G. Chapman*.

“Resolved—That the minutes of the meeting held on

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the 9th day of *September* instant, be confirmed—That the sum of 100,000*l.* be subscribed in one thousand shares of 100*l.* each; and that the sum of 2*l.* 10*s.* *per* share be paid into the hands of the treasurers at the time subscribing—That twenty shares be the qualification or number to be held by each person in the direction.

(Signed) *H. Solly*, Chairman."

At an adjourned meeting, held the same day :—

"Present, Major *Russell*, *Charles Gell*, *E. H. Creasy*, *George Chapman*, and *G. A. Muskett*.

"Mr. *Chapman* reported to the meeting, that, having seen Mr. *Kemp* this day, since the former meeting, Mr. *Kemp* consented that a trial for water should be made by the company on *White Hawke Hill*, without any charge on his part for the same."

A meeting was also held on the 19th *September*, at which it was resolved that a trial for water should be made on *White Hawke Hill*; and that a call should be made of 2*l.* 10*s.* on each share. The defendant *Muskett* was present at this meeting.

On the 28th *October*, another meeting was held, at which the defendant *Lousada* was present; but neither of the defendants attended any of the subsequent meetings of the company.

On the 30th *December*, a further meeting was held, when the engineer who had been employed by the company for the purpose of boring for water on *White Hawke Hill*, reported that water had been found, and handed in an estimate of the probable expense of the undertaking.

On the 3rd *January*, 1826, the following advertisement for tenders for excavating and forming reservoirs, was inserted by the directors in a *Brighton* newspaper :—

“ Brighton Water Company.

“ To excavators, diggers, and others.

“ The directors of the Brighton Water Company are ready to receive proposals for excavating and removing the earth and chalk for forming one or more reservoirs. Particulars may be had between the hours of ten and twelve in the forenoon, at the office of Mr. Chapman, solicitor, No. 1, Dorset Gardens, where the plan and specifications may be seen. The tenders are required to be delivered on or before the 13th instant.”

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The plaintiff sent in a tender, which was accepted by the directors, and the work for which the action was brought was accordingly done.

On the 16th *January*, a prospectus was issued detailing the object for which the company was formed. This prospectus was headed, *“ The Brighton Water Company;”* and, after giving the names of the directors (amongst which were those of the defendants), engineer, and solicitor, stated, *inter alia*, as follows:—

“ That a company had been formed for the ample supply of Brighton and its vicinity with pure and uncontaminated water—

“ That the Brighton Water Company had been successful in obtaining an abundant supply of water from a spring into which they had already sunk a shaft, in the vicinity of the town; and were rapidly proceeding in the construction of reservoirs and other requisite works; on the establishment of which they had agreed for the purchase of ample plots of freehold ground, in situations the most advantageous, and at such an elevation as would enable them to supply the whole town—

“ That application would be made to Parliament in the then session, for leave to bring in a bill to regulate and establish the company; for which proper notice would be given—

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“ That the undertaking consisted of one thousand shares; and that, towards the disbursement for the lands agreed for, and for every expense of completing the works requisite for the supply of *Brighton*, according to the plans and estimates of the company's engineer, including such mains as should allow of their future extension, the capital proposed to be raised was 25,000*l.*, being 25*l.* *per* share, of which 2*l.* 10*s.* *per* share was payable at the time of subscribing, and the remainder by quarterly instalments—

“ That a discount of 5*l.* *per cent. per annum* would be allowed to any proprietor chusing to pay his instalments in advance—and

“ That a proprietorship of twenty shares should be a director's qualification.”

The plaintiff's tender was accepted; and at a meeting held on the 30th *March*, 1826, a resolution was entered into by the directors, agreeing to pay him for the excavations at a certain rate *per* square yard. No act of Parliament for incorporating the company was obtained; and ultimately the project was abandoned. There was no evidence that the defendants had ever ceased to be directors.

The learned Judge left it to the Jury to say, whether the defendants had agreed to become directors, and had acted as such, and paid the deposit on the shares allotted to them in that capacity; telling them, that, if they had done so, they were liable for the plaintiff's demand.

The Jury returned a verdict for the plaintiff—damages, 598*l.* 17*s.* 6*d.*

Mr. Serjeant *Wilde*, in *Michaelmas* Term, 1829, obtained a rule *nisi* that this verdict might be set aside, and a nonsuit entered, on the ground that it was not warranted by the evidence.—He submitted that the defendants were not partners in any joint concern; that the object for which

the proposed company was to be established was very limited, and could not be effected without the sanction of an act of Parliament; that neither of the defendants had taken part in any proceedings of the company since the meeting of the 28th *October*, 1825; that they had had no notice of the contract entered into by the rest of the directors with the plaintiff; and that the mere fact of their having long antecedently to the date of the contract attended meetings of the company, gave their co-directors no implied authority to bind their credit to an unlimited extent in the prosecution of an unsanctioned speculation.

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The case stood over for the decision of *Fox v. Clifton* (a), which it was supposed would decide the general question involved in this and several other similar cases. Judgment having been given in that case at the close of the last term, and the relative situations of the defendants in that case and the present differing, cause was on a former day in this term shewn against this rule by—

Mr. Serjeant *Taddy* and Mr. Serjeant *Jones*.—There is no pretence for disturbing this verdict. It appears that, at a meeting held on the 9th *September*, 1825, it was resolved that a company should be formed for certain purposes; and that certain persons (amongst whom were the defendants) should be a committee of directors for the general management of the affairs of the company. The defendants were not present at this meeting; but, on the 17th of the same month, another meeting was held, at which both the defendants were present, when it was resolved that the minutes of the meeting held on the 9th should be confirmed. The defendants, therefore, accepted the appointment of directors for the management of the affairs of the company. They afterwards attended other

(a) *Ante*, p. 676.

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meetings, and were parties to the resolutions adopted at those meetings; and they also accepted the number of shares necessary to qualify them to act as directors, and paid the deposits thereon. Being thus once fairly clothed with the character of directors, they became liable for all debts incurred by the authority of the committee, and remained so liable at the time the contract upon which this action is brought was entered into by their co-directors with the plaintiff; they having done nothing to relieve themselves from the responsibility imposed upon them by their acceptance of the office of directors. The present case is on that ground distinguishable from *Fox v. Clifton*, and the other previous decisions upon the subject.

Mr. Serjeant *Wilde* and Mr. Serjeant *Andrews* (for *Muskett*), and Mr. Serjeant *Spankie* (for *Lousada*), in support of the rule.—This is not the case of a trading partnership, and therefore it is not within the rule as to the implied agency of partners. It is material to consider the nature of the concern. One of the conditions of the formation of the company was, that it should be carried on solely on the authority of an act of Parliament. Such were the terms upon which the defendants consented to become directors. They were not the persons who actually gave the order for the work in question; neither were they parties to the resolution empowering the directors to proceed with the undertaking and advertise for tenders. The only act authorized by either of them was that of boring for water; a mere trial for the purpose of determining whether or not certain land that had been offered to them was suitable for the purposes of the company. An associate in an undertaking of this description gives such authority only to bind his credit as is necessary for the furtherance of the design of the association. The learned Judge merely left it to the Jury to say whether the defendants were directors, and had paid the instalments on the shares allotted

to them in that capacity. But something more should have been inquired into, *viz.* whether they had done any act to shew that they meant to involve themselves to an unlimited extent, or gave an unlimited or unconditional authority to their co-directors to pledge their credit further than for the purpose of procuring an act of Parliament, in pursuance of the resolution to that effect entered into at the meeting of the 9th *September*.

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Lord Chief Justice TINDAL.—The question is, whether the two defendants entered into the joint contract for the work and labour in respect of which this action is brought. To establish that fact, it was not necessary to shew that they actually signed any joint contract; it will be enough to shew that they have suffered themselves to be held out as parties thereto. The contract was entered into on the 16th *January*, 1826; it consisted of a tender sent in by the plaintiff on that day in consequence of an advertisement inserted on the 7th in a *Brighton* newspaper by order of the directors. Let us see the situation of these defendants at the time of that advertisement—whether they were at that time directors, or had allowed themselves to be held out to the world as such; for, by the terms of that advertisement, the directors of the company became liable for the work in question. The advertisement was as follows:—“The directors of the *Brighton* Water Company are ready to receive proposals for excavating and removing the earth and chalk for forming one or more reservoirs. Particulars may be had between the hours of ten and twelve in the forenoon, at the office of Mr. *Chapman*, solicitor, No. 1, *Dorset Gardens*, where the plan and specifications may be seen.” If, then, the defendants by their conduct authorized the publication of that advertisement, they are equally liable with the rest of the directors. It appears that they accepted the office of directors, attended at several meetings of the directors, and purchased the

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number of shares requisite to qualify them to act in that capacity. They were, therefore, not only directors, but were actually interested in the funds of the concern. It is sufficient, however, to say that they were directors, and acted as such. Having retained their character of directors up to the month of *September*, 1825, what have they since done to divest themselves of that character? It certainly was competent to them at any time to retire from the direction: but, unless they have expressly done so, and have allowed their names still to be used, they must take the consequences; they stand in the like situation with the members of a partnership who, after they have seceded from the firm, still allow their names to remain exposed to view over a shop door. It has been contended, on the part of the defendants, that, in incurring the liability in question, the directors exceeded their authority as directors, inasmuch as the prospectus held out that an act of Parliament would be applied for, to regulate the concerns of the company. No doubt such a course would be more convenient for the government of such a body, as they would thus obtain power to lay down pipes, to sue and be sued in the name of one of their officers, and the like; but it no where appears that the obtaining of an act of Parliament was held out as a condition precedent to the formation of the company: neither does the advertisement say any thing about an act of Parliament. It is true that the prospectus stated that an act would be applied for; but it was clearly understood that the works were to go on in the mean time.

The defendants, therefore, having once accepted the office of directors, and having done nothing to rid themselves of the responsibilities attached to that office, the only question to be considered was, whether they had allowed themselves to be held out to the plaintiff as directors at the time the contract for the work in question was entered into. Upon the evidence given at the trial, I think the

Jury could come to no other conclusion; and therefore I think the verdict ought not to be dirturbed.

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Mr. Justice PARK.—I am of the same opinion. Joint stock companies have of late years given rise to a great deal of discussion in *Westminster-Hall*. At first, they were compared to common cases of partnership; but, in the late case of *Fox v. Clifton*, which was decided upon the fullest consideration, the Lord Chief Justice stated three grounds upon which the liability of parties embarking in projects of this nature rests (*a*), *vis. first*, whether, at the time of making the contract, the defendants were partners in the concern—*secondly*, admitting that they were not partners in fact, whether they had by their conduct held themselves out to the plaintiffs as partners, or allowed themselves to be so represented, at the time of making the contract—*thirdly*, whether, admitting the defendants to have been at one time dormant partners in the concern, any one of them had ceased to be a partner before the contract in question was made. The second point considered in that case goes the length of fixing these defendants. They were not partners in the general sense of the term, but they suffered themselves to be held out as partners. They allowed their names to appear as directors in the prospectus issued by the company; they also attended three meetings of the directors, and appropriated to themselves the number of shares required to qualify them to act as directors. The defendants, therefore, were parties to the advertisement for tenders for the work in question, and knew of the work being done, and expressed no dissatisfaction; neither have they done any act to divest themselves of the character of directors, or of the responsibility belonging to that character.

(a) *Ante*, Vol. 4, p. 711.

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Mr. Justice GASELLE was not present at the argument, and therefore declined expressing his opinion.

Mr. Justice BOSANQUET.—I concur in opinion with my Lord Chief Justice and my Brother *Park* that there is no ground for disturbing the verdict that has been found in this case. It appears that the learned Judge who tried the cause left it to the Jury to say whether the defendants had accepted the office of directors. At the first formation of the company, the defendants were invited to become directors; and, though they did not immediately assent, they afterwards attended several meetings of the company. Having, therefore, once consented to become directors, and having acted as such, and done nothing to discharge themselves or disavow the liability imposed upon them by that character, and the work in question having been done under the sanction of the board of directors, and being within the scope of their authority as such, and essential to the interests of the company, the defendants are clearly liable. I entirely agree with the doctrine laid down in the case of *Nockells v. Crosby (a)*. It was there held, that, if the projectors of a scheme, to be carried on by subscription, induce a number of persons to subscribe their money in the purchase of shares, and the scheme is abandoned before it comes into operation, the subscribers are entitled to maintain an action for money had and received against the projectors for the whole money subscribed, free from any deduction for expenses incurred in the formation of the plan. It is but just that parties originating a scheme, and assuming to act as directors thereof, should, on its proving unsuccessful, bear the expenses incurred in endeavouring to carry it into execution.

It is not necessary in a case of this description to shew that the defendants actually gave the order for the work

(a) 5 Dow. & Ryl. 751; S. C. 3 Barn. & Cress. 814.

done, or signed any contract relating thereto. It is sufficient if the order be given by the board of directors, to render all the directors liable.

Rule discharged.

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ROE, on the demise of DURANT, v. MOORE.

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THIS was an action of ejectment. By a memorandum in writing made between *George Durant* (the lessor of the plaintiff), of the one part, and *Thomas Moore*, of the other part, it was agreed that *Moore* should hold and enjoy a certain messuage and farm, called *Tong Farm and Vauxhall*, situate in the parish of *Tong*, as tenant to the said *George Durant*, for and during the term of one year from the 25th *March* then last, and so from year to year as both parties should think fit, determinable at the end of any year upon either party giving to the other six months' notice in writing of his intention to make void the agreement, under a reserved yearly rent of 290*l.* At *Michaelmas*, 1829, a notice was served on *Moore*, requiring him to deliver up possession at *Lady-day*, 1830. He having held over, the present action was brought.

In ejectment, where the defendant has given the undertaking to give the plaintiff judgment of the term preceding the trial, in case he shall obtain a verdict, and has also entered into the recognizance, with two sureties, to pay costs and damages, both which are required by the 1 *Geo. 4*, c. 87, s. 1, he cannot afterwards sue out a writ of error upon the judgment, so as to operate a stay of proceedings, without entering into a further recognizance, with two sureties, with condition pursuant to the provisions of the 16 & 17 *Car. 2*, c. 8, s. 3.

The tenant *Moore*, on being permitted to come in and defend, besides the common consent rule, had given the undertaking, and entered into the recognizance required by the 1st section of the 1 *Geo. 4*, c. 87, *vis.* an undertaking, "in case a verdict should pass for the plaintiff, to give him a judgment to be entered up of the term next preceding the time of trial;" and a recognizance with two sureties in the sum of 300*l.*, conditioned to pay the costs and damages which should be recovered by the plaintiff (a).

(a) See the section set out in the judgment, *post*.

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The cause was tried before Mr. Justice *Bosanquet*, at the last *Summer Assizes* for *Shrewsbury*, when a verdict was found for the plaintiff.

The defendant obtained a writ of error, which was tested on the 10th *August* (the day of the trial), returnable on the Morrow of *All Souls*, and allowed and served on the 11th. On the 12th, he entered into the recognizance to prosecute the writ of error (his own recognizance only) conformably to the provisions of the statute 16 & 17 *Car. 2*, c. 8, s. 3, for staying execution on bringing writs of error upon judgments in ejectment. On the 18th *August*, the plaintiff's agent took out a summons for the defendant to shew cause why execution should not issue upon the judgment, notwithstanding the writ of error. On the 26th, the summons came on to be heard before Mr. Justice *Gaselee*, who thereupon ordered "that the said defendant should, within ten days, in addition to the recognizance already entered into by him on bringing the writ of error, procure two sufficient suréties to enter into recognizance in 300*l.* each, with such condition as should be conformable to the provisions made for staying execution on bringing writs of error upon judgments in actions of ejectment, by the statute 16 & 17 *Car. 2*, c. 8; and, further, that, in default thereof, the lessor of the plaintiff should be at liberty to issue execution."

The defendant not having complied with this order, the writ issued, and he was turned out of possession.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* that the order of the learned Judge, and the writ of *habere facias possessionem* consequent thereon, might be set aside, and the possession of the premises in question restored to the defendant.—He submitted that the defendant had done all that was required of him, by entering into the recognizance under the 16 & 17 *Car. 2*, c. 8; and that the further security given to the plaintiff

by the 3rd section of the 1 *Geo.* 4, c. 87, was only necessary where the defendant applied to the Judge to stay execution upon the judgment, and not where the proceedings were stayed by a writ of error.

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Mr. Serjeant *Russell* now shewed cause.—If the practice contended for on the part of the defendant be allowed to prevail, the object of the statute 1 *Geo.* 4, c. 87, will be altogether defeated. The bringing of a writ of error does not necessarily operate as a *supersedeas*. If it be sued out contrary to good faith or to the undertaking of the party, the Court will not allow it to take effect as a stay of proceedings. In *Cave v. Massey* (a), where the defendant had, as matter of indulgence, obtained time to plead, on the condition of giving the plaintiff judgment as of the term in which the time was obtained, it was held that he must give an available judgment, and could not afterwards bring a writ of error. And, in *Doe d. Morgan v. Roe* (b), in ejectment, the tenants in possession having undertaken to appear, entered into the common consent rule, pleaded *instante*, and took short notice of trial, and made no defence at the trial, but sued out a writ of error when judgment was signed—the Court allowed the lessor of the plaintiff to sue out execution on his judgment against the casual ejector (c). Upon the sound construction of the statute 1 *Geo.* 4, c. 87, it clearly is not competent to a defendant in ejectment to sue out a writ of error, so as to stay the proceedings, and deprive the lessor of the plaintiff of his right to immediate execution, unless he pursue the course pointed out by the 3rd section, by entering into a recognizance, *with two sureties*, conditioned as is mentioned in the statute 16 & 17 *Car.* 2, c. 8, s. 3.

(a) 5 *Dow. & Ryl.* 624; *S. C.* B. Moore, 574.
3 *Barn. & Cress.* 735.

(b) 3 *Bing.* 169; *S. C.*, *nomine* (c) See the cases cited in *Tidd's*
Doe d. Morgan v. Frisby, 10 *J.* *Practice*, pp. 1146-7.

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Mr. Serjeant *Wilde*, in support of his rule.—The learned Judge had no jurisdiction in the case; the plaintiff had no right to require the recognizance mentioned in the order. The 1 *Geo.* 4, c. 87, does not apply. The defendant has not sought to obtain the stay of execution there contemplated. Neither has he pledged any faith; he is merely pursuing his ordinary rights. The undertaking required by the 1st section of the 1 *Geo.* 4, is a matter of legal operation, not the act of the parties. There is nothing in that act to annul the provisions of the 16 & 17 *Car.* 2; it merely directs, that, if the defendant wishes to obtain some further advantage, he shall pay a certain price for it. This defendant has complied with the statute of *Charles*, and therefore there was no ground for the interference of the Judge.

Lord Chief Justice TINDAL.—The question in this case is, whether, since the statute 1 *Geo.* 4, c. 87, came into operation, where the provisions mentioned in the first section have been resorted to, the defendant is at liberty to sue out a writ of error to operate a stay of proceedings, without pursuing the course pointed out by the third section. Upon the best consideration I have been able to give the subject, I am of opinion that he is not.

The 1st section enacts, “That, where the term or interest of any tenant now or hereafter holding, under a lease or agreement in writing, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired or been determined, either by the landlord or tenant, by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand made in writing, and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon pro-

ceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant, requiring him to appear in the Court in which the action shall have been commenced on the first day of the term then next following, or, if the action shall be brought in *Wales*, or in the counties palatine of *Chester*, *Lancaster*, or *Durham*, respectively, then on the first day of the next Session or Assize, or at the court day or other usual period for appearance to process then next following (as the case may be), there to be made defendant, and to find such bail, if ordered by the Court, and for such purposes as are hereinafter next specified; and upon appearance of the party at the day prescribed, or, in case of non-appearance, on making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the Court for a rule for such tenant or person to shew cause, within a time to be fixed by the Court, on a consideration of the situation of the premises, why such tenant or person, upon being admitted tenant, besides entering into the common rule, and giving the common undertaking, should not undertake, in case a verdict should pass for the plaintiff, to give the plaintiff a judgment to be entered up against the real defendant, of the term next preceding the time of trial, or if the action shall be brought in *Wales*, or in the counties palatine respectively, then of the Session, Assize, or court-day (as the case may be) at which the trial shall be had, and also why he should not enter into recognizance, by

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himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff; and it shall be lawful for the Court, upon cause shewn, or upon affidavit of the service of the rule, in case no cause shall be shewn, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings and to find such bail, with such conditions, and in such manner, as shall be specified in the said rule, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court to enlarge the time for obeying the same, then, upon affidavit of the service of such order, an absolute rule shall be made for entering up judgment for the plaintiff."

It is to be observed that the undertaking here alluded to is not an undertaking which the defendant is bound at all events to enter into. On the contrary, the rule for the undertaking is a rule *nisi* in the first instance, against which he may shew cause, and the Court will only require him to do that which is reasonable. The defendant is not now in the condition of a defendant in an ordinary ejectment; he is bound by his undertaking to give the plaintiff (on his obtaining a verdict) a judgment of the term preceding the trial. Clogged with this undertaking, he cannot stay the proceedings without complying with the requisitions of the third section of the statute, which enacts, "that, in all cases in which an undertaking shall have been given, and security found, as prescribed by the first section, upon the tenant's appearing to defend, if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the Judge before whom the same shall have been had, that the finding of the Jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the Judge to order the execution of

the judgment to be stayed absolutely till the 5th day of the term then next following, or till the next Session, Assize, or court-day (as the case may be); which order the Judge shall in all cases make upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that within four days from the day of trial he shall actually find, security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the Judge shall direct, conditioned not to commit any waste, or acts in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure, produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be had upon the judgment, or the same be set aside, as the case may be: Provided always, that the recognizances last above mentioned shall immediately stand discharged and be of no effect, in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ shall become bound with two sureties unto the defendant in the same, in such sum and with such condition as may be conformable to the provisions respectively made for staying execution on bringing writs of error upon judgments in actions of ejectment, by an act passed in *England* in the *sixteenth* and *seventeenth* years of the reign of King *Charles the Second* (a)."

By this section, two modes are specifically pointed out by which execution may be stayed—*first*, by order of the Judge, where the verdict is against evidence—*secondly*, on the defendant finding security not to commit waste. When this latter mode is had recourse to, the section provides, that, if the defendant brings a writ of error, he shall become bound, with two sufficient sureties, in such sum and with such condition as are required by the 16 & 17 *Car.*

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2, c. 8, s. 3; and that then the intermediate recognizance (not to commit waste) shall be of no effect. It therefore clearly appears to me, that, where the course pointed out by the 1st section of the 1 Geo. 4, c. 87, has been resorted to, the stay of execution contemplated by the Legislature is to rest upon the recognizance or undertaking mentioned in the 3rd section. The defendant has overstepped this provision, and gone back to the old act. In order, however, to get rid of the judgment, and of his undertaking pursuant to the 1st section of the 1 Geo. 4, a defendant must adopt one of the courses pointed out by the 3rd section. The defendant in this case has not pursued either of those courses, and therefore I am of opinion that the writ of error does not operate a stay of the proceedings.

Mr. Justice GASELER.—I still retain the opinion I formed on making the order. The object of the act of Parliament professedly is, to enable landlords more speedily to get possession of their lands where their tenants hold over after the expiration of their term, or of the notice to quit; it gives them an opportunity of obtaining judgment of the term preceding the trial. Looking at the 1st and 3rd sections, it appears to me to have been in the contemplation of the Legislature that execution should issue immediately upon the verdict and judgment, except in two cases—*first*, where the Judge, *ex mero motu*, stays the proceedings, in which case no conditions are imposed upon the defendant—*secondly*, where the proceedings are stayed upon the application of the defendant, in which case he is required to enter into a recognizance, with two sureties, in such reasonable sum as the Judge shall direct, conditioned not to commit waste, &c. The proviso for staying the execution upon the bringing a writ of error imposes upon the defendant, in lieu of the last-mentioned recognizance, the recognizance required by the 16 & 17 Car. 2, c. 8, s. 3. The statute does not contemplate the suing out a writ of

error until after this recognizance has been entered into. If this were otherwise, the second provision would be altogether nugatory, for there would then be no necessity for an application to the Judge.

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Mr. Justice BOSANQUET.—I am of the same opinion. The question turns on the construction to be put upon the undertaking directed by the 1 Geo. 4, c. 87, s. 1, to be given by the tenant on his being admitted to come in and defend in ejectment, *viz.* the undertaking to give the plaintiff judgment of the term preceding the trial, in case he shall obtain a verdict. The act applies to the case of landlord and tenant only, and to cases where the tenant has held under a lease or agreement, and holds over after the expiration of his term, or where the tenancy has been determined by a regular notice to quit. These facts are to be sworn to, and then the plaintiff may have a rule *nisi*. An opportunity is thus given to the defendant to shew cause if he thinks fit. If the rule is made absolute, the defendant must enter into the undertaking. That undertaking has been given in this case; and the question is, what interpretation is to be put upon it. It appears to me that the judgment contemplated therein must be an available judgment, such as to enable the plaintiff to have execution immediately. It is true that the defendant's right to bring a writ of error is not taken away; but it is equally manifest that the Legislature only contemplated that execution should be stayed in the cases provided for by the 3rd section of the act, as stated by my Lord Chief Justice. If a party could get rid of the effect of his undertaking by suing out a writ of error upon his own recognizance only under the 17 & 18 Car. 2, the provisions of the 1 Geo. 4, c. 87, s. 3, would be without effect.

Mr. Justice ALDERSON.—I am of the same opinion. The defendant in this case has, besides entering into the com-

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mon undertaking upon his being admitted to defend, given the undertaking required by the statute 1 Geo. 4, c. 87. The question is, whether that undertaking is to be rendered unavailing by the defendant's bringing a writ of error without entering into the recognizance with two sureties, as required by the third section of the act. This would be an absurd consequence. Undoubtedly, the party is entitled to sue out a writ of error; but subject always to the restrictions imposed by the statute. The act has carefully protected the tenant in all material respects.

Rule discharged.

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PHILLIPS v. MAILE.

In replevin for seizing cattle alleged to be *damage feasant*, the plaintiff pleaded a right of common over the *locus in quo*, awarded him by the commissioners under an act for inclosing the waste lands of G., by which the award of the commissioners was declared to be final unless appealed from by an action upon a feigned issue to be brought at the next or the following Assizes:—*Held, first*, that, after the expiration of the time limited for

THIS was an action of replevin for seizing two cows belonging to the plaintiff, upon a certain common called *West Common*, in the parish of *Gumcester*, otherwise *Godmanchester*, in the county of *Huntingdon*.

The defendant made cognizance, alleging the freehold of the *locus in quo* to be in the bailiff, assistants, and commonalty of *Gumcester*, as lords of the manor of *Gumcester*, and that the cattle in question being there *damage feasant*, he, the defendant, as the servant of the said bailiff, assistants, and commonalty, took them, &c.

The plaintiff pleaded twelve pleas. Issue was taken upon the eight first.

The eighth plea, which was by reference incorporated in the 9th, 10th, 11th, and 12th (*inter alia*), alleged—That, on the 1st *July*, 1802, by a certain act of Parliament made and passed in the forty-third year of the reign of King

disputing the award, the original right of common of the plaintiff could not be called in question—*secondly*, that the corporation of G., who were mentioned in the act as lords of the manor, and received under it an allotment in lieu of their manorial rights, were bound by the act.

George the Second, intituled “ An act for dividing and inclosing certain open and common fields, meadows, lands, commons, and commonable places, within the parish of *Gumcester*, otherwise *Godmanchester*, in the county of *Huntingdon*”—after reciting that there were within the parish of *Gumcester*, otherwise *Godmanchester*, in the county of *Huntingdon*, certain open and common fields, meadows, lands, commons, and commonable places, containing by estimation 4,600 acres, or thereabouts; and also reciting that the bailiff, assistants, and commonalty of *Gumcester*, otherwise *Godmanchester* aforesaid, were lords of the manor of *Gumcester*, otherwise *Godmanchester*, and as such did claim to be entitled to the right of the soil within the said manor—commissioners and a surveyor were appointed for valuing, allotting, and setting out, &c., the common fields and commonable places, &c.; and it was, among other things, enacted, that, if any dispute or difference should arise between any of the parties interested, or claiming to be interested in the said division and inclosure, touching or concerning the right to the soil of the said commons and waste grounds, or any part or parts thereof, or touching or concerning the respective rights and interests which they or any of them should have or claim to have in the same, or touching or concerning any other matter or thing relating to the said divisions and allotments, it should and might be lawful for the said commissioners, and they were thereby authorized and required, with all convenient speed, to proceed to hear and determine such claims and objections: And it was further enacted, that the said commissioners should, and they were thereby required to set out, allot, and award unto and for the said bailiff, assistants, and commonalty, and their successors, as lords of the manor of *Godmanchester* aforesaid, such part of the said lands and grounds within the said parish of *Godmanchester* thereby intended to be divided and inclosed, as in the judgment of the said com-

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missioners should be equal to one twentieth part of the waste or known common lands within the parish of *Godmanchester* aforesaid, for the use and in lieu of, and as a full compensation and satisfaction for all the rights and interests of the said bailiff, assistants, and commonalty, as lords of the said manor, in and to the soil of all the waste or known common lands within the said parish of *Godmanchester*: And it was provided and enacted, that, in case it should appear to the said commissioners that it would be more advantageous to fence the whole or any part of the said meadows, rather than permit the same to remain uninclosed, it should be lawful for the said commissioners to inclose the whole, or such part or parts thereof as they should think proper, in such and the same manner as other lands were directed to be inclosed by the said act; but, for the full enjoyment of such part of the said meadows which should be left uninclosed, the said commissioners should and might, and they were thereby authorized and empowered, by their award, to stint, ascertain, and express what number and sorts of cattle each of the proprietors of commonable messuages and lands in the said meadows should be at liberty at seasonable times to feed and depasture thereon, and also to ascertain the time or times when such feeding and depasturing should begin and end: and the same meadows from thenceforth should be fed and depastured only by such number and sorts of cattle, and at such time or times, as in the award to be made by the commissioners should for that purpose be expressed: And it was further provided and enacted, that the said commissioners should set out, allot, and award, as and for a common pasture, to be used, stocked, and enjoyed as therein-after mentioned, out of and from certain commons in *Godmanchester* aforesaid, called the *East* and *West* commons, such plot or plots of land or ground as should in the judgment of the said commissioners be a full equivalent, satis-

faction, and compensation for the rights of common of all the owners and proprietors of commonable messuages or cottages, for such messuages or cottages only, as well on the said commons as on the said meadows and common fields within the said parish of *Godmanchester*, which said plot or plots of land should be held, used, stocked, and enjoyed by such owners or proprietors, and their respective tenants and occupiers of the said messuages and cottages only, as a common pasture, in such manner as the said commissioners should in and by their award direct and appoint: And it was further enacted, that all tofts, foundations, or sites of antient commonable messuages or cottages should, upon proof thereof being made to the satisfaction of the said commissioners, be considered and deemed as commonable messuages or cottages respectively, and that the respective owners thereof should be entitled to the same compensation for the respective rights of common originally belonging thereto, as if such messuages or cottages had still been standing: And it was further provided and enacted, that, in case any person or persons interested in the said then intended division and allotment should be dissatisfied with any determination of the said commissioners touching or concerning any claim or claims, or other rights or interests in, over, or upon the land and grounds thereby directed to be divided, allotted, and inclosed, or any part thereof, it should be lawful for the person or persons so dissatisfied to proceed to a trial at law of the matter so determined by the said commissioners, at the then next or at the following Assizes to be holden for the said county of *Huntingdon*: and, for that purpose, the person or persons who should be dissatisfied with the determination of the said commissioners should, upon giving notice to the said commissioners of his, her, or their intention to bring such action, within one month after such determination should be made, cause an action to be brought up-

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on a feigned issue against the person or persons in whose favour such determination should have been made, within three calendar months next after the determination of the said commissioners should be so made: And it was provided, that the determination of the said commissioners touching such claim or claims of right to the soil of the said commons and waste grounds, or other rights or interests, in, over, or upon the lands and grounds thereby directed to be divided, allotted, and inclosed, or any part thereof, which should not be objected to, or, being objected to, the party or parties objecting should not cause such action at law to be brought and proceeded in as aforesaid, should be final and conclusive upon all parties: provided that nothing in the said act contained should authorize the said commissioners to determine the title to any messuages, cottages, lands, tenements, or hereditaments whatsoever: And it was further enacted, that the award to be made by the said commissioners, when inrolled in the manner directed by the said recited act, should be deposited in the parish church of *Godmanchester* aforesaid; and that all notices required to be given by the said commissioners relating thereto, and to the public carriage roads, should be inserted in the *Cambridge Chronicle*: And it was enacted, that, if any person or persons should think himself, herself, or themselves aggrieved by any thing done in pursuance of that act, other than and except such orders and determinations of the said commissioners as were therein directed to be final or conclusive, and except in such cases where an issue at law should be tried as thereinbefore mentioned, then, and in every such case, he, she, or they might appeal to the General Quarter Sessions of the peace which should be holden for the county of *Huntingdon*, within six calendar months next after the cause of complaint should have arisen, on giving to the said commissioners, and to the party or parties concerned, eight days'

notice in writing of such appeal, and of the matter thereof; and the Justices not interested in the premises, in their said General Quarter Sessions, were thereby required to hear and determine the matter of every such appeal, and to make such order, and award such costs and damages, as to them in their discretion should seem reasonable. The plea then concluded to the country.

The ninth plea stated—That, before and at the time when &c., the plaintiff had been and was seised in his demesne as of fee of and in a certain messuage (being one of the commonable messuages mentioned in the said act of Parliament in the eighth plea before mentioned), with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid; and that, long before and at the time of the making and executing the award thereafter mentioned, the owner and proprietor thereof for the time being had a certain right of common of pasture in, upon, and throughout a certain common, situate and being within the said parish of *Gumcester*, otherwise *Godmanchester*, in the county aforesaid, called the *West Common*, mentioned in the act of Parliament in the eighth plea mentioned, and therein called the *West Common*; that the said commissioners in the said eighth plea mentioned, having taken upon themselves the burden of the execution of the powers vested in them by the said act in the eighth plea mentioned, in pursuance of the said act, and before the said time when &c., under their respective hands and seals, to wit, on the 23rd day of *June*, 1809, to wit, at &c., did make their award in writing of and concerning the said division and inclosure mentioned in the said act; which said award, fairly written on parchment, was then and there read and executed by the said commissioners in the presence of the proprietors of the lands mentioned in the said act, who did attend at a special general meeting called and held for that purpose, of which ten days' notice had been given in the *Cambridge Chronicle*, being a paper for that pur-

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pose mentioned in the said act, and circulated in the said county of *Huntingdon*, and which execution of the said award was duly proclaimed the then next *Sunday*, in the parish church of *Gumcester*, otherwise *Godmanchester*, being the parish in which the said last-mentioned lands did lie; by which award the said commissioners did (amongst other things) set out, allot, and award as a common pasture, to be used, stocked, and enjoyed by the owners and proprietors of commonable messuages or cottages, and the respective tenants and occupiers of the said messuages and cottages only, having right of common upon the said common in *Gumcester*, otherwise *Godmanchester* aforesaid, known by the name of the *West Common*, the plot of land or ground therein mentioned, that is to say, "*West Common* allotment," unto and for the owners and occupiers of commonable messuages or cottages, and toftsteads, and the respective tenants or occupiers of the said messuages and cottages, and toftsteads, having right of common upon the *West Common*, in *Godmanchester* aforesaid, one plot of land or ground, &c.: And the said commissioners did award, order, and direct that no stock of any kind should be turned upon the said *West Common* by any person or persons whomsoever after the 14th day of *February*, until the 13th day of *May*, in every year; and that, on the 13th day of *May*, until the 23rd day of *November*, in every year, every owner or occupier of any commonable messuage or cottage, or toftstead, being the site of an antient commonable messuage or cottage within the said parish, according to the list contained in the schedule thereunto annexed, might stock upon the said *West Common* two cows for every such messuage, cottage, or toftstead; and that, on the 23rd day of *November*, in every year, until the 14th day of *February* following, every owner or occupier might stock four sheep for every such messuage, cottage, or toftstead; and that every owner or occupier of any messuage, cottage, or toftstead, having a right of common upon the

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said *West Common*, keeping only one mare or gelding to enable him to follow any trade or occupation, who should be desirous of turning such mare or gelding on the said *West Common*, instead of two cows, in manner before mentioned, should be at liberty so to do, provided no foal should be put in with any such mare: as by the said award, reference being thereunto had, will, amongst other things, more fully and at large appear: and the plaintiff said that the said plot of land or ground last thereinbefore mentioned and described, being the place in which &c., was part of the said common mentioned in the said act of Parliament in the said eighth plea mentioned, and therein called the *West Common*; and that the said messuage of him the said plaintiff mentioned in that plea, was inserted, specified, and mentioned by the said last-mentioned commissioners in the list contained in the schedule annexed to the said award, as one of the messuages in respect of which the owner or occupier thereof might use, stock, and enjoy the said plot of land or ground thereinbefore mentioned and described, being the place in which &c., as a common of pasture, in the manner by the said last-mentioned commissioners in and by their said award directed and appointed: By virtue of which said act, and of which said award, the plaintiff, being so seised of the said last-mentioned messuage as aforesaid, at the said time when &c., had, and still of right ought to have, a right of common of pasture in and over the said place in which &c., that is to say, a right to stock the same place in which &c. with two cows on the 13th day of *May*, until the 23rd day of *November*, in every year, at his free will and pleasure, as to his said last-mentioned messuage with the appurtenances belonging; and, being so seised of the said last-mentioned messuage, with the appurtenances, he afterwards, and before the time when &c., to wit, on the day and year in the said declaration mentioned, being between the 13th day of *May* and the 23rd day of *November*, in the year last aforesaid, turned and put the said two

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cows, being his own cattle, and the said cattle in the said declaration mentioned, into the said place in which &c., to feed and depasture on the grass there then growing, and to use the said common of pasture of the said plaintiff there, as he lawfully might; and the said cattle remained there feeding and depasturing on the grass there then growing, and using the said common of pasture, until the said defendant, of his own wrong, at the said time when &c., took the said cattle in the said place in which &c., and unjustly detained the same against sureties and pledges, until &c.

The tenth plea did not materially differ from the ninth.

The eleventh alleged a right of common in the plaintiff over the *locus in quo*, awarded to him as occupier of a commonable messuage within the parish, without stating the existence of a right of common prior to the passing of the act.

The defendant demurred to the ninth, tenth, and eleventh pleas. The demurrer to the eleventh plea was not material to the question in issue. To the ninth and tenth, the grounds of demurrer set forth were, that, in order to justify a trespass upon the soil and freehold of another, the plaintiff should have distinctly set forth in the pleadings the nature, extent, terms, and mode of enjoyment of the rights of common claimed, so that issues might have been taken thereon; and that the commissioners under a private act of Parliament could not give a right of common over the soil and freehold of a stranger to the act, who took no benefit under it.

The plaintiff joined in demurrer.

The twelfth plea set out, by way of inducement, that the plaintiff was a freeman of *Gumcester*, and alleged the right of common before the passing of the Inclosure Act to have been in the owners of commonable messuages, being freemen of *Gumcester*. To this plea the defendant replied, that the plaintiff was not a freeman of *Gumcester*.

The plaintiff demurred to that replication, as tendering an immaterial issue. Joinder by the defendant.

The demurrers now came on for argument.

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Mr. Serjeant *Wilde*, for the plaintiff.—The point which arises upon the record is, in substance, whether, since the passing of the act of Parliament referred to in the pleadings, and the award of the commissioners acting under it, it is competent to the plaintiff to put the defendant to proof of his original right of common, by distraining as *damage feasant* cattle depasturing upon the common in question. It will be contended on the other side, that the corporation of *Gumcester*, who are the real defendants in the cause, were not privies to the act of Parliament; but the preamble of the act shews clearly that they were contemplated by the Legislature as being parties to it, and they actually took an interest under it. The act begins by reciting that the bailiff, assistants, and commonalty of *Gumcester* are lords of the manor of *Gumcester*. The whole purview of the act professes to affect their manorial rights. This of necessity makes them parties and privies to the act.

[Lord Chief Justice *Tindal*.—The act also directs an allotment to be made to them as lords of the manor.]

And the saving clause excludes all those who have received allotments. They are therefore clearly bound by the act. If that be so, how stands the right of the plaintiff? He was originally possessed of a prescriptive right of common. By the award of the commissioners, his original right is taken away, and the new one substituted. The award is the foundation of his existing right of common; and is by the lapse of time become sufficient evidence *per se* that he was one of the persons having the antient right in lieu of which the commissioners were authorized to award him the limited right in the exercise of which his cattle were distrained.

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The demurrer, therefore, to the replication to the twelfth plea must be allowed; and the demurrers to the ninth, tenth, and eleventh pleas over-ruled.

The case of *Riddell v. White and Others* (a) is an authority to shew that these inclosure bills are not to be considered as merely private bills. In that case, an inclosure act directing part of a waste to be sold *tithe free*, to defray the expenses of the inclosure (the rector being no otherwise a party), and the saving clause being of all claims except of the lord and of the commoners—it was held that the rector's right to the tithes of the waste sold *tithe free* was gone. Lord Chief Baron *Macdonald*, in delivering the opinion of the Court of *Exchequer*, said: "In mere private acts, where, at the prayer of *A., B., and C.*, the Legislature confirm their contract, the enactment is understood to be merely the conveyance of the parties, and is only binding on them. But here the Legislature interfere in another shape; they bind the land itself, and change its nature. By the land being bound, the rights of many persons who could not be parties, being incapable of consent, are bound with it; and the right of the tithe-owner is also concluded."

Mr. Serjeant *Merewether*, for the defendant.—The right of common claimed by the plaintiff is not pleaded with sufficient certainty; there is no specification of the time, place, or manner of exercising it. *Hawkins v. Eccles* (b) shews the strictness required in pleading rights of common. There, the defendant averred in his avowry, that all those whose estate he then had, from time whereof &c., had been accustomed to have, and of right, *during all the time aforesaid*, ought to have had, and still of right ought to have, common of pasture in the *locus in quo*—it was held that the avowry was bad, and that it did not

(a) 1 Anstruther, 281.

(b) 2 Bos. & Pull. 359.

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amount to an averment of right of common at all times of the year. It is not to be presumed that the proceedings of commissioners under a local act have been regular, or that they had jurisdiction in the matter; those facts must be shewn. Powers such as those entrusted to the commissioners under the act of Parliament in question, are required to be exercised most strictly. In the case of *The King v. Washbrooke* (a), an inclosure act directed the commissioners to fix and ascertain the boundaries of a parish, and to advertise in a provincial newspaper the boundaries so fixed and ascertained; and that the boundaries *so fixed and ascertained should be set forth and described in their award*, and be final, binding, and conclusive on all parties whatsoever: and the commissioners advertised one set of boundaries, which varied from those described in the award—it was held that their award was not conclusive, because they had not strictly pursued the powers given them by the act. And in *Rex v. Haslingfield* (b), upon an indictment against the parish of *Haslingfield* for not repairing a highway, an award made by commissioners under an inclosure act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the defendants, without shewing that the commissioners had given the previous notices required by the act, before they ascertained the boundaries; it appearing that the usage had not been pursuant to the award, the defendants having since the award, as well as before, repaired the highway. In the present case, the defendant may clearly dispute the fact whether the particular messuage in respect of which the right of common was awarded, was one the owner or occupier of which was entitled to common before the passing of the act.

(a) 7 Dow. & Ryl. 221; S. C.
 4 Barn. & Cress. 732.

(b) 2 Man. & Selw. 558.

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[Lord Chief Justice *Tindal*.—The only question appears to me to be, whether the time for calling in question the plaintiff's right under the award is not now gone by.]

The question is, whether the corporation of *Gumcester* are so bound by the act of Parliament as to be out of the pale of the saving clause; for, if the act be conclusive upon them, no antient right in the plaintiff need be averred.

[Lord Chief Justice *Tindal*.—This is not a public act, and therefore, the saving clause not being pleaded, we cannot take judicial notice of it.]

[Mr. Justice *Gaselee*.—The corporation is mentioned in the recital of the act.]

The recital in a private act cannot affect strangers. Besides, it is nowhere averred that the corporation of *Gumcester* there alluded to is the same body as the corporation that are in effect parties to this record.

Mr. Serjeant *Wilde*, in reply.—The defendant claims to represent the owners of the fee of the common allotted. The plaintiff claims to be the owner of a commonable messuage, in respect of which the right of common in question was awarded to him. These two facts are admitted upon the face of the record. Now, after a lapse of twenty-one years, when the existence of that antient right has become difficult of proof, and immaterial, the plaintiff cannot be compelled to set out and prove such antient right. It has been argued that it is not to be presumed that commissioners under a local act have pursued the authorities given them thereby. The cases cited in support of that argument are not cases in which any presumption could arise; for, it was made distinctly to appear to the Court, that the commissioners had not done that which was necessary to legalize their acts. Those cases therefore are very far from being authorities to shew that the Courts will, at any distance of time, require that those who rely upon acts done by such commissioners, shall prove that every

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thing was done by them regularly and properly. The pleas in bar, however, do, in fact, aver that every necessary step was regularly pursued by the commissioners; and there is no special demurrer, to enable the defendant to take advantage of the insufficiency of that general allegation.

The act directs that the award of the commissioners shall stand in the place of a verdict: and in the case of *Lord Radnor v. Reeve* (a) it was held, that, if the judgment of commissioners of appeal in certain cases be declared final by statute, their judgment cannot be questioned.

Lord Chief Justice TINDAL.—The question in this case arises upon the ninth, tenth, and eleventh pleas in bar. A question also arises upon the replication to the twelfth plea; but, as that falls within the same principle, it will be sufficient to state our opinion upon the three pleas I have adverted to.

The objections taken to the pleas are, that they do not state the original right of common in lieu of which the substituted right was given by the award of the commissioners; and that the corporation of *Gumcester*, the real avowants, were not privy to the act of Parliament in question, and consequently not bound by its provisions. It appears to me, however, on looking to the pleadings set out upon the record, that they were not only privy, but parties to the act. Looking to the act of Parliament as set out on the record, I find that the bailiff, assistants, and commonalty of *Gumcester* are lords of the manor of *Gumcester*. I also find that there is within the parish of *Gumcester* a certain common, called *West Common*. The act recites, “that there were within the parish of *Gumcester*, otherwise *Godmanchester*, in the county of *Huntingdon*, certain open and common fields, meadows, lands, and commonable places,

(a) 2 Bos. & Pul. 391.

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containing by estimation four thousand six hundred acres, or thereabouts; and that the bailiff, assistants, and commonalty of *Gumcester* were lords of the manor of *Gumcester*, and as such did claim to be entitled to the right to soil within the manor." The act then appoints commissioners and a surveyor for valuing, allotting, and setting out, &c., the common fields and commonable places, &c.; and requires the commissioners "to set out, allot, and award unto and for the said bailiff, assistants, and commonalty, and their successors, as lords of the manor of *Gumcester*, such part of the said lands and grounds within the said parish of *Gumcester* thereby intended to be divided and inclosed, as in the judgment of the said commissioners should be equal to one twentieth part of the waste or known common lands within the parish of *Gumcester* aforesaid, for the use, and in lieu of, and as a full compensation and satisfaction for, all the rights and interests of the said bailiff, assistants, and commonalty, as lords of the said manor, in and to the soil of all the waste or known common lands within the said parish of *Gumcester*." By reference to the pleadings, we find that the persons for whom the distress in question was taken, are the bailiff, assistants, and commonalty of *Gumcester*; that they are the lords of the manor of *Gumcester*; and that the place where the distress was taken is called *West Common*. It is impossible, therefore, not to infer that the real defendants in this action are the persons mentioned and intended in the act of Parliament referred to; for, we cannot intend that there are two corporations bearing the same name, and both claiming to be lords of the manor of *Gumcester*, nor that there are two places in the county known by the same name. The whole question, therefore, arises, upon the construction of the act of Parliament.

I am of opinion that it was not meant that the substituted right should be traversable or disputable, except in the manner pointed out by the act. It would be extremely

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detrimental and injurious to the interests of the parties concerned, if the original right of common could be called in question again after so great a length of time, and the inquiry into such original right delayed until the death of all those who might at first have been able to prove the right had rendered such proof impossible. That would be a strong argument to shew that the antient right was not to be disturbed after the act of Parliament had been carried into effect. The act gives the commissioners a legislative authority to decide upon all claims preferred before them; and declares that their determination shall be final; And it enacts—"that, in case any person or persons interested in the said then intended division and allotment, shall be dissatisfied with any determination of the said commissioners touching or concerning any claim or claims, or other rights or interests, in, over, or upon the lands and grounds thereby directed to be divided, allotted, and inclosed, or any part thereof, it shall be lawful for the person or persons so dissatisfied to proceed to a trial at law of the matter so determined by the said commissioners, at the then next or at the following Assizes to be holden for the said county of *Huntingdon*; and, for that purpose, the person or persons who shall be dissatisfied with the determination of the said commissioners, shall, upon giving notice to the said commissioners of his, her, or their intention to bring such action, within one month after such determination shall be made, cause an action to be brought upon a feigned issue against the person or persons in whose favour such determination shall have been made, within three calendar months next after the determination of the said commissioners shall be so made." And—"that the determination of the said commissioners touching such claim or claims of right to the soil of the said commons and waste grounds, or other rights or interests in, over, or upon the lands and grounds thereby directed to be divided, allotted, and inclosed, or any part thereof, which shall not be

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objected to, or, being objected to, the party or parties objecting shall not cause such action at law to be brought and proceeded in as aforesaid, shall be final and conclusive upon all parties."

Inasmuch, therefore, as the plaintiff's claim was one that was capable of being litigated at the time the commissioners awarded thereon, and their award was not objected to within the time or in the manner limited and mentioned by the act, I am of opinion that it cannot now be called in question. It is enough to say, that, otherwise, parties would never be safe in the enjoyment of the rights acquired under the act, even at the most distant period. Finding that the commissioners have in express terms decided that the plaintiff had an original right of common, in lieu of which they have given him the substituted right which he now claims, I am of opinion that the corporation of *Gumcester* cannot now dispute that right.

With respect to the question upon the replication to the twelfth plea, that the plaintiff was not a freeman of *Gumcester*, as alleged in his pleas, I think that fact cannot now be put in issue. The rights of common established by the commissioners are not to be questioned in either manner. It seems to me, therefore, that the plaintiff is entitled to judgment.

Mr. Justice GASELER.—I am of the same opinion. It is sufficient if any one of the pleas be without objection. Upon the eleventh plea only I think the plaintiff would be entitled to judgment. What was required by the act to be done? The commissioners were to appoint a meeting for parties to deliver in their claims in writing, at which meeting the objections to such claims were also to be made; and the act proceeds to declare—"that, if any dispute or difference should arise between any of the parties interested, or claiming to be interested, in the said division and inclosure, touching or concerning the right to the soil of

the said commons and waste grounds, or any part or parts thereof, or touching or concerning the respective rights and interests which they or any of them should have, or claim to have, in the same, or touching or concerning any other matter or thing relating to the said divisions and allotments, it should and might be lawful for the said commissioners, and they were thereby authorized and required, with all convenient speed, to hear and determine such claims and objections." The act further gives a power of appealing from the determination of the commissioners within a given time, and also another mode of calling it in question, *viz.* by "an action to be brought upon a feigned issue against the person or persons in whose favour such determination should have been made, within three calendar months next after the determination of the commissioners should be so made." If the parties interested in questioning the award of the commissioners omitted so to do within the times and in the manner limited and directed by the act, they were for ever afterwards precluded from objecting to it. The commissioners made their award, recognizing the plaintiff's claim. The eleventh plea does not commence with stating that the plaintiff was possessed of an antient messuage, &c., but that he was seised of a commonable messuage, which "was inserted, specified, and mentioned by the commissioners in the list contained in the schedule annexed to their award, as one of the messuages in respect of which the owner or occupier thereof might use, stock, and enjoy the said plot of land or ground thereinbefore mentioned and described, being the place in which &c., as a common pasture, in the manner by the said commissioners in and by their said award directed and appointed;" and that, by virtue of the act of Parliament and of the award, he had a right of common of pasture over the *locus in quo*. There is nothing inconsistent in that plea, and it affords a decisive answer to the defence attempted to be set up.

The bailiff, assistants, and commonalty of *Gumcester*,

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mentioned in the pleas, and the corporation described in the act as being lords of the manor of *Gumcester*, must be the same parties. The Court will not presume that there are two corporations at the same place, having the same title, and both claiming to be lords of the same manor.

Mr. Justice BOSANQUET.—Two questions have been raised in this case—*first*, whether the plaintiff was bound to set out the extent of common to which he was entitled before the award of the commissioners under the inclosure act in question—*secondly*, whether the corporation of *Gumcester*, who are the substantial defendants upon this record, are the persons alluded to in the act, and bound thereby. Upon both these points I am of opinion that the plaintiff is entitled to judgment. It appears that the commissioners made an award recognising the right claimed by the plaintiff. The effect of that award being to extinguish the antient right of common within the parish, the award becomes the foundation of the plaintiff's title. The act of Parliament has been so very fully commented upon by my Lord Chief Justice and my Brother *Gaselee*, that I conceive it to be unnecessary for me again to refer to it; suffice it to say, that it appears to me that the award of the commissioners is conclusive, where not challenged within the time prescribed by the act, and according to the modes pointed out for that purpose; and that therefore it is not competent to the corporation of *Gumcester*, or those acting under them, at this distant period to contest the *quantum* of right.

The corporation of *Gumcester* were clearly bound by the act. They are stated in the act to be lords of the manor of *Gumcester*, and as such claiming to be entitled to the right of the soil within the manor. It would, therefore, be extraordinary if the act of Parliament did not affect them. I cannot entertain a doubt as to their being in the contemplation of the Legislature.

Mr. Justice ALDERSON.—I am of the same opinion, for the reasons already given. In all local acts, all parties are bound that are in any way interested in the thing which is the subject of legislation.

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Judgment for the plaintiff.

DAVIES, Demandant; DAWKINS, Tenant;
 EVANS, Vouchee.

Monday,
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MR. Serjeant *Jones* moved that this recovery might pass.

By a rule of this Court, of *Michaelmas* Term, 39 *Geo.* 3, it is ordered, that “no common recovery or fine shall be suffered to pass, unless the taking of the warrants of attorney be before one of the Justices or Barons in *Westminster-Hall*, or one of the serjeants at law, unless an affidavit be made and filed, stating that the commissioners taking the same are, to the best of the deponent’s belief, either barristers of five years’ standing, or solicitors or attornies of some of the Courts in *Westminster-Hall*.” The statute 1 *Will.* 4, c. 70, s. 16, authorizes attornies of the Great Sessions in *Wales* to practise in all actions or suits in the Courts at *Westminster*, where the parties reside within the principality of *Wales*.

The acknowledgment of a warrant of attorney for suffering a recovery in *Wales* may be taken by an attorney of the Court of Great Sessions, although the tenant to the *præcipe* do not reside within the principality.

In this case, the party before whom the acknowledgment was taken, was not an attorney of one of the Courts at *Westminster*, but only an attorney of the Great Sessions in *Wales*. The tenant to the *præcipe* was an attorney residing in *London*.

Lord Chief Justice TINDAL.—This is not an action or suit brought against a party residing within the princi-

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pality of *Wales*; and therefore the enabling clause of the statute 1 *Will.* 4, c. 70, does not apply. It seems to me, however, that this case does not fall within the rule of the Court which requires the warrant of attorney to be taken before a Judge or serjeant at law, a barrister of five years' standing, or an attorney or solicitor of one of the Courts at *Westminster*; for that rule only applies to fines and recoveries levied or suffered in *England*. I therefore see no objection to the passing of this recovery.

Fiat (a).

(a) Under the rule of Court, *Hilary* Term, 14 *Geo.* 3, attorneys of the Court of Great Sessions in *Wales* were not compe-

tent to take the acknowledgment of a warrant of attorney for suffering a recovery. See *Mullins*, Demandant, 4 Taunt. 584.



Tuesday,
Nov. 23rd.

An action will lie for an excessive distress, and leaving a man in possession, although the goods of the tenant are not so completely removed from his control as to prevent him from carrying on his business.

BAYLIS v. USHER.

THIS was an action on the case for an excessive and vexatious distress.

At the trial before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall* after last *Hilary* Term, the evidence was as follows:—The plaintiff had rented of the defendant certain garden ground. The defendant distrained for 70*l.* rent in arrear. At the time of distraining, the broker left on the premises a memorandum stating that he had seized all the goods upon the premises; and a man was put in possession. The value of the property on the premises belonging to the plaintiff was upwards of 700*l.* It did not appear that the plaintiff had been interrupted in his business; but he was permitted, as usual, to carry vegetables and fruit to market.

On the part of the defendant, it was contended, that,

inasmuch as the property had never been withdrawn from the control of the plaintiff, the action would not lie.

His Lordship left it to the Jury to say whether or not the distress was unreasonable.

The Jury returned a verdict for the plaintiff—damages 15*l*.

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Mr. Serjeant *Wilde*, in *Easter* Term last, obtained a rule *nisi* that this verdict might be set aside, and a new trial had, on the ground urged at the trial.—He submitted that the tenant had sustained no injury; and that the mere wrongful act of distraining for an excessive amount, unaccompanied with damage to the party, could give no right to an action for damages.

Mr. Serjeant *Andrews* shewed cause, and—

Mr. Serjeant *Wilde* was heard in support of his rule.

Lord Chief Justice TINDAL.—It seems to me that the facts proved fully warranted the finding of the Jury. Although the tenant was permitted to carry on his business without interruption; yet the seizure of the whole of his property, worth more than 700*l*., for arrears of rent amounting to 70*l*. only, and the placing a man in possession of all the goods on the premises, without whose permission nothing could be moved, clearly operated a grievous injury to the plaintiff, and gave him a right of action. I therefore think the rule should be discharged.

Mr. Justice BOSANQUET referred to *Willoughby v. Backhouse* (a), where it was held that a right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong

(a) 4 Dow. & Ryl. 539; S. C. 2 Barn. & Cress. 821.

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done; and therefore that the tenant does not waive his right of action for an excessive distress, though he afterwards enters into a written agreement with his landlord respecting the sale of the effects seized.

The rest of the Court concurring—

Rule discharged.

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FULLER v. COOMBE.

The Court discharged with costs a rule for setting aside an execution issued after the allowance of a writ of error, and the justification of bail in error—the writ of error being obtained for the mere purpose of delay, and the bail being men of straw.

A RULE was obtained by Mr. Serjeant *Bompas*, on a former day in this term, calling on the plaintiff to shew cause why a writ of *fieri facias* issued herein should not be set aside for irregularity—the writ having been sued out after the allowance of a writ of error, and the justification of bail thereon.

Mr. Serjeant *Wilde* shewed cause, on an affidavit stating that the writ of error was sued out for the mere purpose of delay, and that the bail were men of straw.—He cited *Ward v. Levi* (a), and *Browne v. Brown* (b); in the former, hired bail, who were insolvent, of whom notice had been given, and to whom no exception was entered, became bail in error; the plaintiff, treating the writ of error and the bail as nullities, entered up judgment, and took out execution: the Court of *King's Bench* held the execution to be regular, and discharged (with costs) the rule for setting it aside—and in the latter, where the same point was determined in this Court, Lord Chief

(a) 2 Dow. & Ryl. 421; S. C. 269, n.
1 Barn. & Cress. 268. And see (b) 4 Bing. 38; S. C. 12 J. B.
Crum v. Kitchen, 1 Barn. & Cress. Moore, 172.

Justice *Best* said: "Attornies should know that hired bail ought not to be put in; particularly in the case of bail in error, who cannot render their principal. In *Ward v. Levi*, I agreed with the Court of *King's Bench*, that such a practice was a fraud upon the Court; I think so still."

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Mr. Serjeant *Andrews*, in support of the rule.—The bail were not excepted to, and therefore cannot be treated as sham bail.

Per Curiam.—This case is decided by *Browne v. Brown*. We agree with the Lord Chief Justice in that case, that the practice in question is a fraud upon the Court, and ought in all cases to be put a stop to.

Rule discharged, with costs.

In re NASH, Executrix of STEWART.

MR. Serjeant *Taddy*, on a former day, obtained a rule *nisi* to set aside, on the ground of usury, a warrant of attorney given to secure an annuity. The facts disclosed in the affidavits were as follow:—

In the year 1805, *James Stewart* and *John Cressett Pelham*, in consideration of 1000*l.* paid to *Stewart*, granted an annuity of 120*l.* to *John Holland* for the term of the joint natural lives of *John Holland*, *Mary*, his wife, *Mary Ann Holland*, and *Lucy Dalrymple*, and the lives and life of the survivors and survivor of the longest liver of them—*Stewart* and *Pelham*, for themselves, their heirs, executors, and administrators, covenanting with *Holland*, his executors, administrators, and assigns, within thirty days next after the decease of such three of them, the said *John*

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An annuity was granted for four lives, with a covenant on the part of the grantor to insure the fourth life, to the amount paid for the consideration, within thirty days after the decease of the three first:—The Court refused to set aside the securities for usury.

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Holland, Mary, his wife, *Mary Ann Holland*, and *Lucy Dalrymple*, who should first depart this life, to insure in some respectable office of insurance in *London*, for the use of the said *John Holland*, his executors, administrators, and assigns, the sum of 1,000*l.* to be paid on the decease of the survivor of them the aforesaid nominees; and, upon the completion of such insurance, to make such assignment of the policy or policies thereof unto the said *John Holland*, his executors, administrators, and assigns, as should be requisite to make over the same and all benefit thereof to him, and for his and their sole use. A warrant of attorney was also executed by the grantors, to enter up judgment for 2,000*l.*; but no judgment was ever entered up.

Mr. Serjeant *Wilde* now shewed cause, on behalf of *Edward Gregory* and *Robert Johnston*, who had purchased the annuity at a sale by the Sheriff, under a writ of *venditioni exponas*.—The insurance was not to be effected until thirty days after three of the four lives had dropped. The fourth might also die in the mean time. The principal would therefore be in hazard at least for that interval. *Cummins v. Isaac* (a), and *Morris v. Jones* (b), are authorities to shew that there is nothing illegal in a contract of this nature. In the latter case, Lord Chief Justice *Abbott* said: “When an annuity is granted for the life of the grantor, it is almost the invariable practice for the grantee to insure the life of the grantor; and in calculating the amount of the annuity, or the consideration to be paid, regard is always had to the terms on which that life can be insured.”

The Court called on—

Mr. Serjeant *Taddy*, to support his rule.—The only

(a) 8 Term Rep. 183.

(b) 2 Barn. & Cress. 223.

ground upon which annuities are held to be without the operation of the statute of usury is, that the principal sum is put in hazard. In the present case the principal never has been in hazard. A covenant for re-payment of the money advanced would clearly be usurious. The covenant to insure gives the grantee the additional security of the assurance office. It has been observed that the principal would be hazarded during the thirty days that are to intervene between the death of the three first nominees and the effecting the insurance; for that the fourth life might also drop within that interval. But that would not discharge the liability of the grantors under the covenant.

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Lord Chief Justice TINDAL.—The question is, whether the advance of money in this case comes within the statute of *Anne*, as being a loan upon which, directly or indirectly, more than 5*l. per cent.* interest has been reserved. The general rule is, that, where the principal is put in hazard, it is no loan; for, a loan contemplates the re-payment of the money advanced. Where there is any uncertainty as to the return of the principal, it only amounts to a question of contract. In the present case, it is impossible for us to say that there has not been a considerable hazard. Suppose the two last lives to drop together, how could it be assigned as a breach of covenant on the part of the grantors, that the fourth life was not insured. Suppose even that an insurance was effected, there are many conditions in policies that might render the insurance ineffectual; for example, the policy might be avoided by suicide or by felony, or by the party insured going abroad. Who can say that, with so precarious a security, the principal is not put in hazard. Upon this ground, therefore, I think the annuity may be supported, and that this rule must be discharged.

Mr. Justice GASELEE and Mr. Justice BOSANQUET concurred.

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Mr. Justice ALDERSON referred to *Grigg v. Stoker (a)*, where an agreement to pay 12*l. per cent.* on the amount of the purchase-money of a vessel, was held not to be usurious, though there was a covenant to keep the vessel insured.

Rule discharged, with costs.

(a) *Forrest*, 4.

Wednesday,
Nov. 24th.

WARD v. WEEKS.

In an action on the case for slanderous words alleged to have been spoken by the defendant of the plaintiff, the declaration alleged, for special damage, that, "by reason of the committing of such grievance, one *B.* refused to give the plaintiff credit." The evidence was, that the defendant had spoken the words to one *E.*, and that *E.* had communicated the statement, as the statement of the defendant, to *B.*, who thereupon refused to trust the plaintiff:—*Held*, that the allegation was not supported; for that it was the repetition of the slander by *E.* to *B.*, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he was not answerable, that was the immediate cause of the plaintiff's damage.

THIS was an action on the case for slander.

The first count of the declaration stated—That the plaintiff had not ever been guilty, nor, until the committing of the several grievances by the defendant as therein-after mentioned, been suspected to have been guilty, of the offences and misconduct thereafter mentioned to have been charged upon and imputed to the plaintiff, or of any other such offences and misconduct, and had always conducted himself in an upright and proper manner; by means of which said premises he, the plaintiff, before and until the committing of the said several grievances by the defendant as thereafter mentioned, had deservedly obtained and enjoyed the good opinion and credit of all his neighbours and other good and worthy subjects of this realm to whom he was in anywise known, to wit, at *Taunton*, &c.: Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his said good name, fame, and credit, and

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to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects that he the plaintiff had been and was guilty of the offences and misconduct thereafter mentioned to have been charged upon and imputed to him, the plaintiff, and was not a person who was worthy or fit to be trusted, and to vex, harass, oppress, impoverish, and wholly ruin him, the plaintiff, theretofore, to wit, on &c., at &c. aforesaid, in a certain discourse which the defendant then and there had in the presence and hearing of divers good and worthy subjects of our lord the now King, of and concerning the plaintiff, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the plaintiff these false, scandalous, malicious, and defamatory words following, that is to say: "*He* (meaning the plaintiff) *is a rogue and a swindler. I* (meaning the defendant) *know enough about him* (meaning the plaintiff) *to hang him.*" [In the second count, the words charged to have been spoken by the defendant were—" *He is a rogue and a swindler.*" in the third count—" *He is a rogue.*" and in the fourth—" *He is a swindler.*"] By means of the committing of which said grievances by the defendant as aforesaid, he the plaintiff had been and was greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, had, on occasion of the committing of the said grievances by the defendant as aforesaid, from thence thitherto suspected, and still did suspect and believe the plaintiff to have been and to be a person guilty of the said offences and misconduct above mentioned to have been charged

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upon and imputed to him the plaintiff by the defendant, and had, by reason of the committing of the said grievances by the defendant as aforesaid, from thence thitherto wholly refused, and still did refuse to have any transaction, acquaintance, or discourse with him, the plaintiff, as they were before used and accustomed to have, and otherwise would have had: And also, by reason thereof, one *John Bryer*, who, before and at the time of the committing of the said grievances, was about to sell and dispose of to the said plaintiff on credit divers goods, wares, and merchandizes necessary and proper for carrying on and commencing the business of a general shop-keeper, which he, the plaintiff, was then and there about to commence, afterwards, to wit, on &c. aforesaid, at &c. aforesaid, wholly refused and thence thitherto had declined to sell and dispose of the same to the plaintiff; and the said *John Bryer*, then and there, by reason of the speaking of the said slanderous words, refused to sell and deliver to the plaintiff other goods on credit, as he otherwise might and would have done: And, by reason of the premises, the plaintiff had lost and been deprived of divers great gains and profits which might and otherwise would have accrued to him from the sale and disposal of the said several goods, wares, and merchandizes to him the plaintiff by the said *John Bryer* on credit, as aforesaid; and the plaintiff had been and was, by means of the premises, hindered and prevented from commencing and carrying on trade and business as he otherwise would have done, and was otherwise greatly injured, to wit, at &c. aforesaid.

The defendant pleaded the general issue.

The cause was tried before Mr. Justice *Bosanquet*, at the last Assizes at *Taunton*. The evidence which the plaintiff was prepared to produce in support of the action was, that the defendant had spoken the words charged in the declaration to one *Edward Bryce*, who communicated the statement, as the statement of the defendant, to *John*.

Bryer; and that *John Bryer* thereupon refused to trust the plaintiff.

It was objected, on the part of the defendant, that this evidence was not admissible, on the ground that the special damage was not the immediate consequence of the defendant's wrongful act, nor wholly arising from it. The learned Judge thereupon directed a nonsuit to be entered.

Mr. Serjeant *Bompas*, in *Easter Term* last, obtained a rule *nisi*, that this nonsuit might be set aside, and a new trial had.

The defendant was the only person against whom an action could have been brought for uttering the slanderous words in question. In the fourth resolution in Lord *Northampton's* case (*a*), it is laid down, that, "In a private action for slander of a common person, if *J. S.* publish that he hath heard *J. N.* say that *J. G.* was a traitor or thief; in an action of the case, if the truth be such, he may justify: but, if *J. S.* publish that he hath heard generally, without a certain author, that *J. G.* was a traitor or thief, there an action *sur le case* lieth against *J. S.*, for this, that he hath not given to the party grieved any cause of action against any, but against himself who published the words, although in truth he might hear them; for, otherwise this might tend to a great slander of an innocent."

[Lord Chief Justice *Tindal*.—In the case there put, the words themselves were actionable; here, they are not so.]

That case was recognised in *Davis v. Lewis* (*b*), where it was held that it is no justification to an action of slander, to plead that such an one told the slander to the defendant; but that, if the person repeating the slander *at the same time* mentioned the name of a person from whom he heard it, that may be pleaded in justification to an action brought against the former. Lord *Kenyon* there said—"If

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a person say that such a particular man (naming him) told him certain slander, and that man did in fact tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken: but, if he asserts the slander generally, without adding who told it to him, it is actionable. It is just, that, when a person repeats any slander against another, he should at the same time declare from whom he heard it, *in order that the party injured may sue the author of the slander.*" The consequence of holding an action of this nature not to be maintainable will be, that parties may be irremediably injured, and have no means of obtaining redress, inasmuch as the authorities above cited shew that the repeater of the slander is not liable to an action, provided he, at the time of speaking the words, mentions the name of his author.

Mr. Serjeant *Wilde*, in *Easter Term*, shewed cause.—

1. The averment of special damage means, not that the damage flowed consequentially, but directly from the defendant's act of speaking. The evidence proposed to be given, therefore, was not receivable under this declaration. The damage accruing from the defendant's act did not wholly result from the cause assigned. A somewhat similar question to this arose in the late case of *Davis v. Garrett* (a), where it was in effect held, that, to form the subject of an action, the damage sustained by the plaintiff must be the immediate and necessary consequence of the wrongful act of the defendant: and in *Vicars v. Wilcocks* (b) it was expressly held, that the special damage must be the legal and natural consequence of the words spoken, otherwise it will not sustain the declaration. In the present case, it is clear, that, if there had been no repetition of the slanderous words, the plaintiff would have received no in-

(a) *Ante*, p. 540.

(b) 8 East, 1.

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jury. When, therefore, the act of the defendant would wholly fail to produce any injurious consequence unless aided by the act of another, how can the injury resulting from the act of that other be ascribed to the defendant? All the evil that has accrued to the plaintiff would have flowed from the act of *Bryce*, independent of the defendant. This is not like an action of trespass for an injury received from something put in motion by the defendant; for, there, the *impetus* originally given continues until the injury complained of is produced. *Bryce* was a voluntary agent; and the defendant is not to be held responsible for any additional malice in the mode of speaking by him. Inasmuch, therefore, as this declaration directly charges an immediate injury resulting from the use of the slanderous words by the defendant, the evidence, which shews that such injury did not proximately result therefrom, was not receivable under it.

2. Supposing the evidence in question to have been admissible on this form of declaration, was it sufficient to support the action? It is said, that the plaintiff will be without remedy if this form of action do not avail him, because *Bryce* is not liable to an action for the part he took in disseminating the slander, he having named his author at the time; and the fourth resolution in Lord *Northampton's* case is cited in support of that position. The Courts have had that case repeatedly pressed upon their attention. It has never, it is true, been expressly over-ruled; but the Judges have always endeavoured to pass it by; and it has only once been directly acted upon or recognised, *viz.* in the case of *Davis v. Lewis*. In *Crauford v. Middleton (a)*, the plaintiff having declared for slanderous words, charging him with felony, said by the defendant to have been spoken of the plaintiff by a person whom the defendant met on the road, judgment was arrested (by the opinion

(a) 1 Levinz, 82.

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of three Judges against Mr. Justice *Twysden*), for want of an averment, that, in truth, nobody had said such words to the defendant. The authorities, however, are abundant, to shew that such an allegation is not necessary. In *Gardiner v. Atwater* (a), the words spoken were—"Thou art a sheep stealing rogue, and farmer *P.* told me so." On motion in arrest of judgment, Lord Chief Justice *Denison* said—"It has been said, that, although the words might be actionable, yet that the plaintiff ought not to have judgment, because it was not averred that farmer *P.* did not tell the defendant so; but the Court were of opinion that that averment was by no means necessary, it being quite immaterial whether farmer *P.* did or did not tell the defendant so." That case is quite inconsistent with Lord *Northampton's* case; and the fourth resolution there was not necessary to the judgment of the Court. In *Lewis v. Walter* (b), the Judges shew an extreme indisposition to adopt the rule laid down in that resolution. In that case, which was an action for a libel published in a newspaper, the defendant pleaded that the libel was originally published in the *H. Journal*, by *J. S.*; and that, at the time of publication by the defendant, it was stated in such publication that it was copied from that newspaper. Mr. Justice *Bayley* said (c)—"If a defendant is to be allowed to rely upon a plea of this nature (supposing that there can be such a plea in bar, *which may be doubtful*), it can only be in a case where he has originally given up the author by name, and where the name is sufficient to identify the party." Mr. Justice *Holroyd* said—"In actions for slander, the truth may be pleaded as a legal defence. But that plea admits the malice, and, notwithstanding that, justifies the publication. It is, however, a very different thing to justify the repetition of slander, by alleging, as a bar, that some other person originally was the author of it. For, it

(a) *Sayer*, 265.(b) 4 *Barn. & Ald.* 605.(c) *Ibid.* 612.

does not follow, that, because a defendant may justify slander if true, he may also justify the repetition of slanderous words which are not true, if he has heard them from another person. Unless we go the length of holding that such a repetition would be justifiable even when spoken from a bad motive, we cannot support the present pleas. All the cases on this subject arise out of the case of *The Earl of Northampton*. They do not, however, confirm that decision; but all go on the ground of being distinguishable from it. The book in which that case is found is not so accurate as the rest of the reports of Lord *Coke*, not having been published by him in his life-time, but from his notes afterwards. The point there is stated in very general terms, and, as it seems to me, may be questionable. It is put thus: 'In a private action for slander of a common person, if *J. S.* publish that he hath heard *J. W.* say that *J. G.* was a traitor or thief, in an action on the case, if the truth be such, he may justify.' It is observable, that Lord *Coke* does not say that it is lawful to repeat slander in all cases and at all times, but only that the party may justify under certain circumstances. If, for instance, he repeats not with intention to defame, that may be so; but it is not laid down that a defendant may maliciously do so; and, unless it goes that length, it will not support the present pleas. But I think it is questionable whether, as stated, it must not have some qualification added; for, in the third resolution, cases are put in which it is held to be unlawful to repeat slander. Taking, therefore, the whole together, it seems to me that the proper way is, to take the passage with this qualification, that, if *J. S.* publish, *on a fair and justifiable occasion*, that he hath heard *J. W.* say that *J. G.* was a traitor or thief, he may, if the truth be such, justify. It must not, therefore, be taken as a general rule, even in oral slander, that the malicious repetition of it may be justified, if the name of the author be given up at the time. If it could, it would be productive of mischief; for,

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the person slandered could bring no action against the malicious repeater; and, if he did discover who the person was, and brought an action against him, he might only be able to support it by the testimony of the very person who had so maliciously repeated it. Perhaps, therefore, the rule has been laid down too largely in *The Earl of Northampton's* case, and ought to be qualified, by confining it to cases where there is a fair and just reason for the repetition of the slander." And Mr. Justice *Best* said: "The attempt here is, to justify this libel under the authority of *The Earl of Northampton's* case. If this precise point had been there determined, I should doubt the propriety of that decision; and I think that the reasons given by my brother *Holroyd* shew that the fourth resolution in that case requires some qualification. For, it cannot be justifiable to repeat slander under all circumstances; but only in those cases where it is done, not for the purpose of merely circulating the slander, but for some fair and reasonable cause."

Holding the present action to be maintainable would, in effect, be making him responsible who did not occasion the mischief, and discharging him who did.

Mr. Serjeant *Stephen* and Mr. Serjeant *Bompas*, in support of the rule.—The injury of which the plaintiff complains was sufficiently shewn to have emanated from the wrongful act of the defendant. It is a novel proposition in law, that the author of a slander is not answerable for his wrong because the slander is disseminated through the agency of a third person. If *Bryce* had, from motives of malice, repeated the words, no doubt he would have been liable to an action. But it is a fallacy to say that *Bryce* in any way contributed to the plaintiff's damage; the injury was the legal and natural consequence of the first speaking of the words. Lord *Northampton's* case was confirmed by Lord *Kenyon* in *Davis v. Lewis*;

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and also in the case of *Maitland v. Goldney* (a), where the whole Court expressly recognised the principle now contended for, *vis.* that the first utterer alone is responsible, unless (as was the fact in that case) the slander be repeated with knowledge that it was unfounded. Lord *Ellenborough* said (b): "In order to justify the parties reviving the slander by naming the original author of it, they must so disclose the matter *as to give the plaintiffs a certain cause of action against the party named.*" Mr. Justice *Lawrence* said: "It is sufficient to say, according to the rule in Lord *Northampton's* case, supported in the late case of *Davis v. Lewis*, that, in order to justify the repetition of slanderous words spoken by another, the defendant must give *a certain cause of action against that other*; and that must be done, not only by naming the author of the slander, but also by giving the very words used." And Mr. Justice *Le Blanc*—"Without entering into the consideration of Lord *Northampton's* case, the rule is clearly established, that, in order to justify the repetition of slander, the defendant must state the name of the person by whom it was first uttered, so as to furnish the plaintiff with a cause of action against him." The reasoning of Mr. Justice *Holroyd*, in the case of *Lewis v. Walter*, seems also to lean to the same conclusion.

Vicars v. Wilcocks has been referred to, to shew, that, to sustain a declaration for slander of this nature, the special damage must be the legal and natural consequence of the words spoken: but, in that case, the damage was not the legal and natural consequence of the words spoken, "but," as Lord *Ellenborough* said, "a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled, and seized the plaintiff,

(a) 2 East, 426.

(b) Ibid. 437.

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and thrown him into a horse-pond by way of punishment for his supposed transgression."

It is not usual to aver in pleading, that the words charged were uttered in the presence of the party from whom the special damage results—*Browning v. Newman* (a), *Hartley v. Herring* (b), *Moore v. Meagher* (c)—it cannot therefore be necessary to prove it. In *Hartley v. Herring*, which was an action on the case for consequential damage arising from slander, imputing incontinence to the plaintiff, the declaration alleged, that the plaintiff was employed to preach to a dissenting congregation at a certain licensed chapel situated at A.; that he derived considerable profit from his preaching; and that, by reason of the scandal, "persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had, and otherwise would have given:" the declaration was held sufficient, although it did not state who the persons were, or by what authority they excluded him, or that he was a preacher duly qualified according to the 10 *Anne*, c. 2.

The case of *Dixon v. Bell* (d) is also somewhat analogous. It was there held that a person, before he entrusts a gun to an incautious agent, is bound to render it perfectly innoxious. And in the case of *The King v. Sir Francis Burdett*, Mr. Justice *Best* said (e): "In the case of a libel, publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the *locus pœnitentiæ*; his offence is complete; all that depends upon him is consummated; and

(a) 1 Str. 665.

(b) 8 Term Rep. 130.

(c) 1 Taunt. 39.

(d) 1 Starkie's N. P. C. 287.

(e) 4 Barn. & Ald. 126.

from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act. Suppose a man wraps up a newspaper and sends it into another county by a boy; who is the publisher? the boy who perhaps cannot read or is ignorant of its contents, or the man who has put it up in the envelope?"

Cur. adv. vult (a).

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This was an action upon the case, in which the words stated in the declaration to have been spoken by the defendant of the plaintiff are—"He is a rogue and a swindler: I know enough about him to hang him:" and the plaintiff then alleges, as a special damage, that, by means of the committing of the several grievances, one *John Bryer*, who, before and at the time of the committing those grievances, was about to sell to the plaintiff on credit goods necessary for the carrying on and commencing of the plaintiff's business as a general shop-keeper, which he was about to commence, refused and declined so to do. The defendant pleaded the general issue. At the trial of the cause, the evidence which the plaintiff was prepared to produce was, that the defendant had spoken the words as laid in the declaration to one *Edward Bryce*, and that *Bryce* had communicated the statement, as the statement of the defendant, to *John Bryer*, who thereupon refused to trust the plaintiff. Upon this statement of the evidence, the learned Judge who tried the cause directed the plaintiff to be called; and the question before us is, whether this nonsuit should be set aside.

(a) Mr. Serjeant *Wilde* stated, at the close of the argument, that he had just been informed that the Court of *King's Bench* had expressly over-ruled the fourth reso-

lution in Lord *Northampton's* case in the late case of *M'Pherson v. Daniels* (not then reported), 10 Barn. & Cress. 263.

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As the words spoken do not contain the charge of any legal definite crime, nor are alleged to be spoken of the plaintiff in the way of his trade or business, so as to impute to him dishonesty in such trade, the words are not actionable *per se*; and the only ground of action is the special damage which the plaintiff has alleged. The question, therefore, is, whether the special damage, which is the gist of the action, has been proved as it is alleged, or whether there is a variance between the allegation and the proof.

The substance of the plaintiff's allegation is, that, by reason of the defendant's false representations to divers persons, one *John Bryer* refused to trust the plaintiff. Now, the evidence necessary to support this allegation would have been, either that *John Bryer* was present and heard the defendant make the representations to some person, or, at the very least, that, when the defendant made such representations, he directed them to be communicated to *Bryer*. But neither of these suppositions exists in fact; on the contrary, the evidence was, that the words were addressed to one *Edward Bryce*, and that *Bryce*, at a subsequent time and place, and without any authority from the defendant, repeated the representations to *Bryer*: the repetition of which words, and not the original statement, occasioned the plaintiff's damage.

Every man must be taken to be answerable for the necessary consequences of his own wrongful acts; but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words: for, no effect whatever followed from the first speaking of the words to *Bryce*. If he had kept them to himself, *Bryer* would still have trusted the plaintiff: It was the repetition of them by *Bryce* to *Bryer*, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's

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damage. We therefore think, that, as each count in the declaration alleges as the only grievance the original false speaking of the words, the allegation, that, "by reason of the committing of such grievance, *Bryer* refused to give the plaintiff credit," is not made out by the evidence; and on this ground we think the nonsuit is right.

It is urged, that, unless the plaintiff can recover against the present defendant, he sustains a great injury, and is altogether without remedy; and the authority in the fourth resolution in Lord *Northampton's* case (*a*) is relied upon for that purpose. But, even supposing the proposition laid down in that case is to be taken as an unqualified proposition that the repetition of slanderous words, stating at the time the name of the author, is, upon all occasions, and under all circumstances, justifiable, which we agree in thinking is far from the import of the resolution, still we must look to the interests of the defendant as well as to those of the plaintiff, and be careful not to make him responsible for a greater measure of damage than flows necessarily from his wrongful acts. But, the resolution above referred to, which has at all times been looked at with disapprobation, has, in the recent case of *M'Pherson v. Daniels* (*b*), been in effect over-ruled by the Court of *King's Bench*: and with the judgment of that Court upon that occasion we entirely concur.

We, therefore, think that the rule for setting aside the nonsuit must be discharged.

Rule discharged.

(*a*) 12 Rep. 134.

(*b*) 10 Barn. & Cress. 263;

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To entitle an attorney to privilege from arrest, he must shew that he is actually practising at the time; a solitary instance of employment at an election will not suffice.

ANONYMOUS.

MR. Serjeant *E. Lawes*, on a former day in this term, obtained a rule *nisi*, on the part of an attorney of this Court, who had been arrested on mesne process, that the bail-bond might be delivered up to be cancelled, upon an affidavit stating that he was arrested whilst in the discharge of professional duties at an election.

Mr. Serjeant *Andrews* now shewed cause.—He submitted that the rule of privilege only applied to attornies actually practising in Court, a fact which was not alleged in the affidavit upon which the motion was founded: and he referred to the case of *Brooke v. Bryant* (a), where Mr. Justice *Lawrence* said: “The privilege of an attorney does not necessarily attach upon a person’s investing himself with that character, but he must be a practising attorney. The rule of Court in 1654 confines the privilege to attornies who have practised within a year. In order to preserve the privilege, therefore, the party must continue to act as such; for, the very foundation of it is a presumption that an attorney is already in Court attending his duty, and therefore the issuing of process merely to bring him there is nugatory. That reason consequently does not apply to an attorney who is not practising at the time.”

Lord Chief Justice **TINDAL**.—The privilege of the attorney is only allowed him for the benefit of his clients. It is necessary, therefore, before a party seeks to avail himself of that privilege, that he should shew himself to be actually practising at the time. In the present case, it is not so sworn. By his shewing one instance of em-

(a) 7 Term Rep. 25

ployment *dehors* the scope of his business as an attorney, it would seem pretty clear that he has no other business to shew. I think the rule should be discharged.

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The rest of the Court concurring—

Rule discharged.

HAYDON, Assignee of SUTTON, a Bankrupt, v. WILLIAMS.

Wednesday,
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THIS was an action of *assumpsit* for an apothecary's bill, brought by the assignee of the apothecary, who had become bankrupt. The demand was for attendance and medicines furnished to the defendant in the year 1820. The declaration was of *Michaelmas* Term, 9 *Geo.* 4—1828. Pleas—the general issue, and the statute of limitations.

The statute 9 *Geo.* 4, c. 14, which requires that a promise to take a case out of the statute of limitations shall be in writing, and signed by the party to be charged thereby, does not alter the law as to the nature of the promise, but merely substitutes a different mode of proof.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall* after last *Hilary* Term. To take the case out of the statute, the bankrupt was called, for the purpose of proving a promise to pay made within six years. The promise in question was contained in a letter written by the defendant to the bankrupt, in 1823, in consequence of a demand made for the debt by the bankrupt's attorney, which letter the bankrupt stated to be lost; and it was proposed, on the part of the plaintiff, to prove its contents by the oral testimony of the bankrupt. It was objected, on the part of the defendant, that the contents of the letter could not be proved by parol;

The defendant, within six years from the time of contracting the debt, stated in a letter written to his debtor—"that he was incapable at that time to pay the money, but that he would pay as soon as he had it in his power

to do so:"—*Held*, that this was a conditional promise only, and therefore not sufficient, *per se*, to take the case out of the statute of limitations, notwithstanding the 9 *Geo.* 4, c. 14.

To take a case out of the statute of limitations, the plaintiff offered to prove by oral testimony a written promise, conformable to the 9 *Geo.* 4, c. 14, the document itself being lost:—*Held*, that such secondary evidence was admissible.

Quære, whether a conditional promise relied on to revive a debt barred by the statute of limitations, should not be declared on as such.

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and the statute 9, *Geo. 4*, c. 14, was referred to (a). On the part of the plaintiff it was contended, that the statute only required that there should have been a promise in writing, leaving such written promise capable of proof in the ordinary way.

His Lordship thought the evidence admissible.

In the letter the defendant wrote—"that he was incapable at that time to pay the money; but that he would pay as soon as he had it in his power to do so." Upon this it was contended, on the part of the defendant, that this conditional promise to pay did not satisfy the words of the statute, which required a direct and unqualified promise; and that, even admitting that a qualified promise to pay might be given in evidence notwithstanding the statute, still that the defendant's ability to pay must be proved. It was also suggested, that the promise should have been declared on as conditional.

A verdict was taken for the plaintiff, subject to a motion to enter a nonsuit upon the above points.

Mr. Serjeant *Jones*, accordingly, in *Easter Term* last, obtained a rule *nisi*. — He referred to *Willis v. Newham* (b), *Tanner v. Smart* (c), *Fearn v. Lewis* (d), and *Scales v. Jacob* (e).

Mr. Serjeant *Wilde*, in last *Trinity Term*, shewed cause. — The secondary evidence of the written promise in this case was properly admitted. The words of the statute

(a) Which enacts "that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, &c., unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the

party to be chargeable thereby."

(b) 3 *Younge & Jerv.* 518.


(c) 6 *Barn. & Cress.* 603.

(d) *Ante*, Vol. 4, p. 1; *S. C.* 6 *Bing.* 349.

(e) 11 *J. B. Moore*, 553; *S. C.* 3 *Bing.* 638.

9 Geo. 4, c. 14, were satisfied by proof that a written promise had existed. That statute was not intended to vary the substantive rules of evidence; it leaves the document to be proved in the ordinary manner. Bills of exchange, by the custom of merchants, must be in writing; but, where a bill is shewn to have been lost, there is no difficulty in proving its contents by parol evidence. The case of *Willis v. Newham* only decided that secondary evidence could not be given of a *verbal* acknowledgment of payment of interest within six years.

The promise in question was made within six years from the time of contracting the debt; it may therefore be taken to be an absolute and unqualified promise, inasmuch as the defendant had at the time of making it no right to annex any condition. The case, therefore presents the same point as that which came before the Court in *Scales v. Jacob* (a). Where the promise is made within six years of the time of contracting the debt, the law implies a general promise, and the plaintiff may sue upon it as upon a general promise at any time within six years from the making of the promise. In *Tanner v. Smart*, Lord *Tenterden* reviewed all the authorities upon the subject. The statute in question was passed in the year following, and may be presumed to have had reference to that decision. The general principle deducible from all the cases appears to be, that, if the promise be made at a time when the defendant is liable for the debt, that is, within

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(a) *Assumpsit* for goods sold. Plea, the statute of limitations. Proof, that, three years after the original cause of action accrued, and within six years of the commencement of the suit, the defendant, on being asked for payment, said that he could not pay then, but that he would do so as soon as he was able:—*Held*, by

Lord Chief Justice *Best* and Mr. Justice *Gaselee* (Mr. Justice *Park* and Mr. Justice *Burrough* dissenting), that this was a conditional promise only, and that it did not take the case out of the statute (21 Jac. 1, c. 16), unless the plaintiff was prepared to prove the defendant's ability to pay.

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six years; it is absolute; but that it is conditional only where it is made at a time when the defendant is not liable.

Mr. Serjeant *Jones*, in support of his rule.—*First*, to take the case out of the statute of limitations, the plaintiff must be prepared to prove at the trial a promise in writing, which can only be done by production of the writing itself—*Secondly*, to satisfy the words of Lord *Tenterden's* act, the promise must be absolute and unqualified—*Thirdly*, the condition, if any, must be proved—*Fourthly*, supposing that the plaintiff was in a situation to shew the defendant's ability to pay, such conditional promise would not support a declaration upon an absolute promise.

1. The evidence produced at the trial must be evidence then existing in writing. Unless that be so, the effect of the statute 9 *Geo.* 4, c. 14, will be altogether destroyed. The policy of the act was to exclude parol testimony; and, provided such evidence as was here admitted be held receivable, a witness who is inclined to commit that perjury which the act was intended to prevent, has only to change the phrase, and thus may, by substituting parol evidence of a written promise for a verbal promise, evade the salutary provisions of the statute. The case of *Willis v. Newham* is not in principle distinguishable from the present. That was an action of *assumpsit* upon a promissory note. At the trial, the plaintiff, having proved the handwriting of the defendant to the note, called two witnesses, who proved verbal acknowledgments by the defendant, that he had made payments for interest in respect of the note within six years. Upon this evidence, Mr. Justice *Bayley* was of opinion, that, although proof of actual payment of interest would be an answer to the statute of limitations, within the provisions of the statute 9 *Geo.* 4, c. 14, yet evidence of an acknowledgment of payment was within the mischief that statute was intended to prevent;

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he therefore nonsuited the plaintiff. Upon a motion to set aside that nonsuit, Mr. Baron *Graham* said (a): "The act says, if a debt be of more than six years' standing, it shall not be taken out of the statute of limitations by a loose and vague conversation, which may be misrepresented; but only by a written promise or acknowledgment, signed by the party to be charged thereby, which cannot be misrepresented, and cannot deceive. It appears to us, therefore, that the payment must be proved, not by a verbal acknowledgment, but by a writing such as the act requires; and that, being so proved, it shall have the same effect as it had before the passing of the act." The words of the statute of frauds, the provisions of which in this respect it was intended to engraft upon the old statute of limitations by Lord *Tenterden's* act, are, "no action shall be brought, &c.," having reference to the time of the acknowledgment or promise; and therefore, in an action upon a promise that enures to take the case out of that statute, secondary evidence might be given of the written promise: but the words of this act have reference to the time of the trial—"no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, &c."

2. The act impliedly requires that the promise shall be absolute and unconditional. The policy of the act was, to avoid all qualified engagements.

3. The statute 9 *Geo.* 4, c. 14, did not intend to vary in any degree the legal construction to be put upon the promise, but merely to substitute a more certain mode of proof, leaving the promise itself exactly what it was before the statute. The promise, therefore, in this case, being conditional, to pay when the defendant should be able, it was incumbent on the plaintiff to prove such ability. In *Scales v. Jacob*, Lord Chief Justice *Best* and Mr. Jus-

(a) 3 *Younge & Jerv.* 523.

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tice *Gaselee* ruled, that, where the promise is conditional, the plaintiff must shew the happening of the event contemplated. Mr. Justice *Gaselee* there said (a): "As to the distinction which has been attempted to be made between a promise given before the expiration of the six years and a promise after, I think it not tenable. It has been argued, that, before the expiration of the six years, the statute does not apply, and that a defendant has within that time no right to add terms to the original contract. Undoubtedly, within the six years, the plaintiff may go on his original contract, notwithstanding any subsequent promise; but here the original cause of action had expired before the action was brought. The defendant, by a subsequent promise, has, upon certain terms, extended the duration of his liability, and if the plaintiff will after six years avail himself of that promise, he must take it as it was given." In *A'Court v. Cross* (b), which was an action of *assumpsit* for money lent, the defendant pleaded *actio non accrevit infra sex annos*. The evidence offered to take the case out of the statute was, that, on his being arrested for the debt, the defendant said to the sheriff's officer—"I know I owe the money, but the bill I gave is on a three-penny receipt-stamp, and now I am arrested I will never pay." This was held not to amount to a promise or acknowledgment of the debt so as to take the case out of the statute of *James*. In *Tanner v. Smart*, the promise proved was very nearly in the same words as that proved in the present case. The defendant there said—"I cannot pay the debt at present, but I will pay it as soon as I can." It was held that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. Lord *Tenterden* there said (c): "Upon a general acknowledgment, where nothing is

(a) 3 Bing. 644.

(b) 11 J. B. Moore, 198; S. C.

3 Bing. 329.

(c) 6 Barn. & Cress. 609.

said to prevent it, a general promise to pay may and ought to be implied; but, where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule '*expressum facit cessare tacitum*' apply?" And in *Fearn v. Lewis* the promise was as follows:—"As soon as my situation will allow, Mr. F.'s claim, with others, shall receive that attention, that, as an honourable man, I consider them to deserve, and it has been and is my intention to pay them. I cannot conclude without saying, I must be allowed time to arrange my affairs. If I am proceeded against, every exertion of mine will be rendered abortive, and the *Benck* or *France* must be my destination." It was held that this was not such an unqualified acknowledgment of an existing debt, as would authorize the Court to infer a promise to pay.

4. It may be questioned whether a conditional promise like the present would support a declaration upon an absolute promise, even if the plaintiff were in a condition to prove the defendant's ability to pay. In *Scales v. Jacob*, Mr. Justice Gaselee says (a): "A promise by a debtor, to pay when he shall be able, certainly differs materially from a promise to pay when requested; nor will evidence of the former promise support a declaration founded upon the latter. In other words, a conditional promise to pay when of ability, cannot be given in evidence under a declaration framed on a general promise to pay."

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The defendant in this case sets up the statute of limitations as a bar to the plaintiff's demand, and the only question is, whether the written letter of the defendant, signed

(a) 11 J. B. Moore, 570.

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by him, of which letter we think secondary evidence was rightly admitted at the trial, is such "an acknowledgment or promise in writing, signed by the party chargeable thereby," as falls within the meaning and intent of the statute 9 Geo. 4, c. 14.

That statute did not intend, as it appears to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof; substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses. To inquire, therefore, whether, in a given case, the written document amounts to an acknowledgment or promise, is no other inquiry than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar operation and effect.

In the present case, the written letter so closely corresponds with the parol promise in *Tanner v. Smart* (a), decided the year before the statute passed, that we hold ourselves governed in the construction of it by the decision in that case. In the letter, the defendant writes—"that he was incapable at that time to pay the money; but that he would pay as soon as he had it in his power to do so." In the case referred to, the defendant says—"I cannot pay the debt at present; but I will pay it as soon as I can." The most acute and discriminating mind cannot form a distinction between the effect of the two expressions. The principle laid down by the Court in that case, and which is deduced from the former decisions, was, that the promise which is given in evidence under the general replication to the statute of limitations, must be one which is consistent with the promises laid in the declaration; and, consequently, that evidence of a conditional promise will not support

(a) 6 Barn. & Cress. 603.

an absolute promise in the declaration. So, here also, we think the promise to pay by the defendant in his letter, being guarded with the condition of his being able to pay, whether it is taken as a new promise, or as a revival of the former, is a departure from the absolute promise laid in the declaration.

It has been urged in argument, that, if the action had been brought within the six years next after the original cause of action, this letter would have been evidence of an acknowledgment of the debt, and would have supported the action. And undoubtedly it would: for, a promise to pay, whether absolute or conditional, does necessarily include an acknowledgment of the debt; and where the defendant is charged on his original liability, he cannot limit the effect of any acknowledgment which he makes, by adding to it any new condition. But, where the action is brought after six years, and the subsequent acknowledgment of the defendant is the very ground of his action, the plaintiff must take it altogether as he finds it, and cannot use the acknowledgment without annexing the qualification also.

Without, therefore, determining whether such a promise ought or ought not to be specially declared upon, it is sufficient to say, that, in this case, there was no proof of the defendant's ability to pay at the time of the action brought, so as to satisfy the condition, and make the promise absolute and unqualified, like those in the declaration.

Upon this ground, we think the case is taken out of the statute, and that the rule for entering a nonsuit must therefore be made absolute.

Rule absolute.

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Thursday,
Nov. 25th.

DAVIS and Others, Assignees of WHITE, a Bankrupt, v.
EYTON.

A lease of lands contained a condition, "that, if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared a bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fiery facias*, or any other writ of execution, should issue, it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, re-possess, and enjoy, as in his former estate." The tenant gave a warrant of attorney, upon which judgment was entered up, and his goods taken in execution and sold, and a commission of bankrupt afterwards issued against him. The lessor entered for the forfeiture:—*Held*, that he was entitled to the emblements.

THIS was an action of trespass for seizing goods alleged to be the property of *White*, the bankrupt. Plea, the general issue.

At the trial before Mr. Baron *Vaughan*, at the last *Spring Assizes* for *Shrewsbury*, the facts appearing in evidence were as follow:—

The bankrupt held a farm as tenant to the defendant from year to year, under a written agreement, containing, amongst other things, the following condition:—

"That, if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared a bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fiery facias*, or any other writ of execution, should issue, it should and might be lawful for the lessor to re-enter into the demised premises, and the same again to have, re-possess, and enjoy, as in his former estate."

On the 26th *March*, 1829, the bankrupt *White* executed a warrant of attorney to secure a debt of 1084*l*. On the 28th, judgment was entered up thereon; and on the 7th *April*, a writ of *fiery facias* issued, under which writ the bankrupt's goods and farming-stock were seized on the 8th, and sold on the 16th and 18th. On the 11th *May* following, the defendant, the landlord, entered for the forfeiture, taking possession of the standing crops; and on the 19th a commission of bankrupt issued against *White*, under which the plaintiffs were appointed assignees, and now brought their action against the defendant for the value of the crops seized by him, which they claimed as

emblements; and also for the value of certain hay and straw belonging to *White*, which had been left on the premises.

A verdict was taken for the plaintiffs for 472*l.* 19*s.* 6*d.*—442*l.* 19*s.* 6*d.*, the value of the crops, and 30*l.*, the value of the hay and straw; leave being reserved to the defendant to move to reduce the verdict to the latter sum, if the Court should be of opinion that the bankrupt or his assignees were not entitled to the emblements.

Mr. Serjeant *Russell*, accordingly, in *Easter Term* last, obtained a rule *nisi*.—He referred to *Roe d. Hunter v. Galliers* (a), *Co. Litt.* (b), *Bulwer v. Bulwer* (c), and *Rolls's Abridgment* (d).

Mr. Serjeant *Wilde* now shewed cause.—The defendant's right of re-entry for breach of the condition in question did not entitle him to possess himself of the growing crops. Where an estate is held subject to a condition, and the tenant commits a forfeiture, the act being his own, he is not entitled to emblements; but, where the forfeiture is occasioned, not by the act of the tenant, but by the act of another, or by judgment of the law, he is entitled. Speaking of tenants at will, *Littleton* says (e): *Si le lessee emblea la terre, et le lessor, apres l'embleer, et devant que les blees sont matures, luy ousta, uncore le lessee avera les blees, et avera frank entre egres et regres. a scier et de carrier les blees, pur ceo que il ne sçavoit a quel temps le lessor voloit entre sur luy. Autrement est si tenant per terme d'ans, que conust le fine de son terme, emblea sa terre, et le terme est finy devant que les blees sont matures. En ceo cas le lessor, ou celui en la reversion, avera les blees, pur ceo que le termor conust le certaintie de sa terme, quant sa terme*

(a) 2 Term Rep. 133.

(b) Page 55. b.

(c) 2 Barn. & Ald. 470.

(d) Tit. "Emblements," Vol. 1, p. 726.

(e) Section 68.

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serroit finy." Lord Coke, commenting upon this passage, says (a): "The reason of this is, for that the estate of the lessee is uncertaine, and therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reape the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And this is not only proper to a lessee at will, that, when the lessor determines his will, the lessee shall have the corne sowne, &c., but to every particular tenant that hath an estate incertaine, for that is the reason which *Littleton* expresseth in these words, '*pur ceo que il n'ad ascun certaine ou sure estate.*' And therefore, if tenant for life soweth the ground, and dieth, his executors shall have the corne, for that his estate was uncertaine, and determined by the act of God. And the same law is of the lessee for years or tenant for life. So, if a man be seised of land in right of his wife, and soweth the ground, and he dieth, his executor shall have the corne; and, if his wife die before him, he shall have the corne. And if a woman that holdeth land *durante viduitate sua*, soweth the ground, and taketh husband, the lessor shall have the emblements, because that the determination of her own estate grew by her own act. But, where the estate of the lessee, being incertaine, is defeasible by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition, &c., there he that hath the right paramount, or that entreth for any forfeiture, &c., shall have the corne." In *Rolle's Abridgment* it is said (b) that, "if a lease be made to husband and wife during coverture, and the husband sow the land, and afterwards they must be divorced *causa præcontractus*, the husband shall have the corn"—"Because," as Lord Coke says (c), "the sentence which dis-

(a) Co. Litt. 55. a, 55. b.

(c) 5 Rep. 116 a; S. C. Cro.

(b) Tit. "Emblements," Vol. 1, Eliz. 460.

p. 726—*Oland's case*.

solves the marriage is the judgment of the law, and *judicium redditur in invitum*." That which has happened in the present case would not of itself operate a forfeiture, unless by the act of the landlord, which comes *in invitum*. In *Bulwer v. Bulwer*, the right of the party was determined by his own act only. To constitute a ground of forfeiture, the entire act entailing it must be the act of the tenant. Here, it could not be said to be the sole act of the tenant that gave the landlord the right to re-enter, inasmuch as it in part depended upon the acts of third parties, over whom the tenant had no control. It was also uncertain whether the lessor would chuse to avail himself of the forfeiture; great inconvenience would therefore necessarily result from the admission of the doctrine contended for on the part of the defendant.

Mr. Serjeant *Russell* and Mr. Serjeant *Stephen*, in support of the rule.—The validity of the covenant in question is established by the case of *Roe d. Hunter v. Galliers*. Mr. Justice *Ashhurst* there said: "The general principle is clear, that the landlord, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they are not illegal or unreasonable. Then, is this proviso contrary to any express law, or so unreasonable as that the law will pronounce it to be void? That it is not against any positive law is admitted, and no case has decided it to be illegal." And Mr. Justice *Bulwer* said—"This is a stipulation not against law, not repugnant to any thing stated in the former part of the lease, but merely a stipulation against *the act of the lessee himself*, which I think it was competent for the lessor to make." By the operation of the covenant, the defendant entered as of his former estate, and was therefore clearly entitled to the emblements. Lord *Coke* says: "Where the estate of the lessee, being incertaine, is determined by a right paramount, or if the lease determine by the act of the

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lessee, as, by forfeiture, condition, &c., there he that hath the right paramount, or that entereth for any forfeiture, &c. shall have the corne." In *Oland's* case, the forfeiture accrued by operation of law. Lord *Coke* distinguishes between conditions in deed and conditions in law (a), and says (b): "Regularly, it is true that he that entreth for a condition broken shall be seised in his first estate, or of that estate which he had at the time of the estate made upon condition." Now, the landlord cannot be said to be in as of his first estate, if the tenant be entitled to emblements. In *Rolle's Abridgment*, it is laid down (c), that—"if a lease be made to a man on condition that, if he doth waste, or any like act, his estate shall cease, and he sows the land, and then does waste, the landlord shall have the emblements"—"So, if there be lessee for life, on condition that, if he does such an act at such a time, he shall only have the land for two years, and he sows the land, and afterwards breaks the condition, by which his estate for two years is finished before the severance of the corn, the landlord shall have the corn." In *Bulwer v. Bulwer*, Lord Chief Justice *Abbott* says: "The general rule of law is, that, when a tenant of land has an uncertain interest, which is determined either by the act of God or the act of another, then he shall have the emblements; but that is not so where the tenancy is determined by his own act." In this case, the acts which led to the forfeiture were clearly the acts of the party.

Lord Chief Justice *TINDAL*.—In this case, the tenant *White* held the premises in question as lessee from year to year, subject to a condition for re-entry by the landlord. That condition was as follows:—"That, if the lessee should commit an act of bankruptcy, whereon a commission should issue, and he should be declared a bankrupt, or if he should

(a) Co. Litt. 201. a. (b) Ibid. 202. a. (c) Tit. "Emblements," pl. 3, 4.

become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fiery facias*, or other writ of execution, should issue, it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, re-possess, and enjoy, as in his former estate."

It appears on the evidence, that, on the 11th of *May*, the landlord did enter for what he alleged to be a breach of this condition, *viz.* that the tenant had incurred a debt upon which judgment was entered up against him, and upon which a writ of *fiery facias* had issued against his effects. The question therefore is, whether, upon such re-entry, the landlord is entitled to the growing corn. In the first place, it is to be observed that this is not the case of an estate the determination of which was originally uncertain; but that of an estate certain, though liable to be defeated by a breach on the part of the lessee of a condition in itself lawful. It is sufficient that the condition has been broken, to entitle the landlord to enter on his paramount title. It therefore seems to me that we might determine this case on the distinction between an estate determinable on the breach of a condition entered into by the party, and an estate the determination of which is by operation of law rendered uncertain.

It has been contended that the breach of condition by which the estate of the lessee was determined, was not the sole act of the lessee, but partly occasioned by the acts of others, and partly by the act of the law. The answer to that argument is this:—The original act upon which were founded the proceedings that led to the forfeiture, was the sole act of the party. The contracting the debt and the omission to pay it were his own acts; so, also, was the neglecting to satisfy the judgment when entered up. The consequences, therefore, clearly resulted from the act of the party himself. It is not necessary that the whole act should be the act of the party alone. There are no cases to shew that the rule is so strict; but, on the contrary

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there are cases to be found in the books to shew it not to be so. For instance, in the case of the resignation of an incumbent, it is well known that the act of resignation is not completed until acceptance by the bishop. *Bulwer v. Bulwer* (a). So, in the case of a surrender, which is to operate a forfeiture, the estate is forfeited although the surrender is not complete by the mere act of the tenant.

It does not, therefore, follow, that there exists any necessity that the act which induces the forfeiture should be the sole and separate and distinct act of the tenant. It is contended that this doctrine will occasion great inconvenience, inasmuch as an interval will always be left wherein it will remain doubtful whether the act of the tenant will be followed by a forfeiture. But, in all cases of forfeiture, it is uncertain whether the landlord will take advantage of it or not; and there must, therefore, always be an interval in which the landlord may give his assent to the perfection of the forfeiture. It seems to me, upon the whole, that that argument fails. The principal authority brought to support the position is *Oland's* case, where it was held, that, if a lease be made to husband and wife during coverture, and the husband sow the land, and afterwards they be divorced *causâ præcontractus*, the husband shall have the corn, "because the sentence which dissolves the marriage is the judgment of the law, and *judicium redditur in invitum*." That was the case of a limitation in itself uncertain in its duration; and it appears that the estate was determined by reason of some matter arising before the granting of the term: the marriage being avoided by the act of the law. In that case it was uncertain how long the relation of husband and wife would continue; and that uncertainty was held to entitle the tenant to the emblements: the just inference there is, that the estate was determined by the act of the law.

(a) 2 Barn. & Ald. 470.

Upon the whole it seems to me that the landlord in this case is entitled to the emblements, inasmuch as his entry accrued upon the act of the party; and therefore that the rule for diminishing the damages by the amount of the emblements must be made absolute.

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Mr. Justice GASELEE.—There is great weight in the argument urged on the part of the defendant, that the re-entry of the landlord was the consequence of a stipulation between the parties; but it is not necessary to decide whether that is true to the extent contended for. The only case cited is *Oland's case*, reported by Lord Coke, and also to be found in *Cro. Elis.* The report in *Coke* does not refer to any particular place where the judgment passed; but, in *Croke*, it is not treated as a judgment that had actually passed; it is merely cited as a supposed case. There is, however, a material difference between that case and the present. Nor does it appear there whether the pre-contract was on the part of the husband or on that of the wife. I am of opinion that the rule should be made absolute.

Mr. Justice BOSANQUET.—I am of the same opinion. It is distinctly laid down, that, where the lessor enters for condition broken, he is entitled to the emblements; for he enters and holds as of his first estate. By the terms of the condition in this case, the lessor was, in certain events, "to re-enter into the demised premises, and the same again to have, re-possess, and enjoy, as in his former estate." One of the events contemplated has happened, and the lessor has re-entered, and possessed himself of the premises. He is in, therefore, as of his former estate, and consequently entitled to emblements. It has been said that the condition was not wholly broken by the acts of the tenant himself, but partly in consequence of the acts of third persons; and that, whether the forfeiture would be

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taken advantage of or not, depended upon the lessor himself, and therefore the estate of the tenant was uncertain. It seems to me, however, that the foundation of the whole was the individual act of the lessee himself; and the lessor of course has the option to avail himself of the forfeiture or not. In *Fauntleroy's* case, the life of the party was insured; he was guilty of a felony, and executed; the insurance office refused to pay the amount insured, on the ground that the death of the assured was the consequence of his own act, which by the conditions would discharge them. The House of Lords held the office not to be liable.

Mr. Justice ALDERSON.—I am of the same opinion. The lessee by his own act incurred the forfeiture. The consequences resulting therefrom only qualified the act of the party; the act pervaded the whole. It therefore appears to me that the lessee, having been turned out of possession in consequence of his own act, was not entitled to emblements; neither are his assignees.

Rule absolute.

Friday,
Nov. 26th.

It is not necessary to produce the original rule on service of a copy, except in cases where the party may be brought into contempt.

HOLMES v. SENIOR.

A RULE *nisi* to compute principal and interest upon a bill of exchange, was obtained by Mr. Serjeant *Goulburn*, on a former day in this term; and, on making the same absolute, it was objected by the officer that the affidavit of service did not state that the rule itself was shewn to the defendant at the time of service of the copy.

Mr. Serjeant *Goulburn*.—The practice in the Court of *King's Bench* requires that the original rule be produced

in those cases only where it is proposed to bring the party into contempt. And although in *Tidd's Practice* (a) it is said to be otherwise in the *Common Pleas*, there seems to be no good reason for the difference of practice in the two Courts. In *Westley v. Jones* (b), the defendant demanded to see the original shortly after the service.

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Per Curiam.—The practice that obtains in the Court of *King's Bench* seems the most sensible, and proper to be adhered to. There is a distinction between those rules which bring the party into contempt and common rules.

Rule absolute.

(a) *Tidd*, 491, *et seq.*

(b) 5 J. B. Moore, 162.

STANIFORTH v. LYALL and Others.

Saturday,
 Nov. 27th.

THIS was an action of covenant, in which the plaintiff complained of certain breaches of the covenants contained in a charter-party made between the parties, dated the 7th November, 1825. All matters in difference in the cause were referred, by a Judge's order in the usual terms, to Mr. *Alderson*. The arbitrator, by his award, directed that final judgment should be entered for the plaintiff, with one shilling damages; and set forth the following facts:—

The plaintiff chartered a ship to the defendants. The charter-party contained a stipulation that the ship should proceed to *New Zealand*, and that, when arrived, the master should give notice of the fact to the defendants' agent

there, and wait fourteen days for a return cargo; but that, if the agent of the defendants should give notice of his determination not to load the ship with a return cargo at *New Zealand*, the voyage should be at an end, and the defendants should pay a dead freight of 500*l.* The ship accordingly proceeded to *New Zealand*, and the master, after waiting the necessary time, and finding no agent of the defendants there, went round to *Batavia*, and there obtained for the ship a much more valuable freight than she would have earned under the charter-party, after taking into consideration the increased expenses and the delay of the circuitous voyage. An action was brought by the owner to recover from the freighters the 500*l.* dead freight. The cause was referred, and the arbitrator, taking into account the larger freight earned by the ship on the homeward voyage, directed the verdict to be entered for one shilling damages, for the general breach of contract:—The Court refused to set aside the award.

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“The ship *Sesostris* was chartered by the plaintiff to the defendants by a charter-party, containing, amongst other things, the following stipulations, *viz.* that, after discharging her cargo at *Port Jackson*, she should proceed to such port or ports in the islands of *New Zealand* as the said freighters or the agent of the company at *Port Jackson*, or in *New Zealand*, should direct; or, in the absence of such direction, then to that port or place in the said islands, at which, upon inquiries to be made by him for that purpose at *Port Jackson*, previously to the said ship's sailing thence, the commander might ascertain that Captain *James Herd* (the superintendant or principal agent of the company in *New Zealand*), or other the superintendant or principal agent of the company for the time being there, or the company's establishment, was settled; or, in case he could not obtain certain information respecting that fact, then to the *Bay of Islands*, where the said commander would ascertain the port or place of the said settlement; and accordingly, the said ship or vessel should forthwith proceed thence to the same port or place; and the said ship having arrived at the port or place in *New Zealand* to which she was to proceed as aforesaid, or as near thereto as she could safely get, the said commander should give notice in writing of such her arrival to the said *James Herd*, or other the superintendant or principal agent of the company for the time being there, and deliver to him the letters intrusted to the care of the said commander; and the said ship or vessel should, if necessary, wait fourteen clear days after the delivery of such notice, for the decision of such superintendant or principal agent, or other the agent of the company at the said island, whether to load the said ship with a cargo for a port in *Great Britain* or not; and, in case the said *James Herd*, or other such superintendant or principal or other agent should, before the expiration of such fourteen days, give notice in writing to the com-

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mander of the said ship, of his determination not to load the said ship with a cargo for a port in *Great Britain*, then, at and from the expiration of the same fourteen days, the voyage of the said ship in the service of the said freighters should be at an end: but, if the superintendant or principal or other agent of the said company for the time being should not before the expiration of the said fourteen days give such notice as last aforesaid, then the said ship should, either at the port or place to which she should have been originally ordered, or at such other port or place, or ports or places in *New Zealand*, as the said superintendant or principal agent for the time being should direct, and within the lay-days or days of demurrage thereafter mentioned, receive and take on board from such superintendant or other the agent or agents or servants of the said company, such masts, spars, and timbers, or all or any of the same, or any such other lawful goods or merchandize as the said superintendant or principal or other agent or agents might tender for that purpose, not exceeding what the said ship could reasonably stow and carry, over and above her stores, tackle, apparel, provisions, and furniture; and the master of the said ship should sign the customary bills of lading for the said cargo: and the said ship, being so loaded, and afterwards dispatched, should therewith proceed with all convenient speed to such port in *Great Britain* as the said freighters or the superintendant or principal agent of the said company in *New Zealand* should direct, and make a right and true delivery of the said cargo. The defendants also stipulated, that, in case the said ship should, according to the true intent and meaning of that charter-party, proceed to and arrive in *New Zealand*, and end her voyage there, the said freighters, their executors, administrators, or assigns, should and would, upon the receipt in *England* of a certificate to that effect from the superintendant or principal agent of the said company, or of

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the notice which should have been given by the said superintendant or principal or other agent, of his determination not to load the said ship as aforesaid, pay to the said plaintiff the sum of 500*l.* as and in full for the freight or hire of the said ship for the voyage which should be so ended. The rate of freight at which the cargo, if loaded on board at *New Zealand*, was to be carried to *England*, and the mode of its payment, were also stipulated for in the said charter-party.

“ Under this charter-party the ship sailed, and duly arrived in *New Zealand*, but no agent on the part of the defendants was there, nor were the defendants, or any one in their behalf, ready to load a full and complete cargo on board, pursuant to the charter-party; nor was there any agent of the defendants in *New Zealand* to give the notice for putting an end to the voyage. The ship, after waiting a reasonable time without being able to hear any thing of the agent of the company at *New Zealand*, sailed in ballast from *New Zealand* round by *Batavia* for *England*. At *Batavia*, in her passage home, she obtained a full cargo of spices and other goods for *England*, and arrived in safety. After taking into consideration the delay in *New Zealand*, and that arising from the more circuitous voyage by *Batavia* to *England*, and the wear and tear of the ship, and the increased expenses of the homeward voyage arising therefrom, and setting on the other side the more valuable freight earned by the ship than she would have earned by carrying home a full cargo from *New Zealand* pursuant to the charter-party, the voyage from *New Zealand*, by *Batavia*, to *England* was, on the whole, more profitable to the plaintiff than if the vessel had been fully loaded by the charterers at *New Zealand* with a cargo, and had brought such cargo in safety home in the usual course of the voyage.

“ Under these circumstances, the arbitrator thought the plaintiff entitled to a verdict, there having been a breach

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of the contract; but that he ought to recover such damages only as he had actually sustained in consequence thereof. He thought that the event in which alone the 500*l.* damages were due had not happened; and that, if it had, the plaintiff would have been entitled to that sum, and no more, whatever might have been the ultimate actual loss sustained by him. If, however, he did wrong in taking into consideration the profits actually earned by the freight from *Batavia* to *England*, then the damages which would have been sustained by the plaintiff would clearly have exceeded 500*l.*, to which sum, however, the plaintiff consented to limit his claim. If, therefore, the Court thought that the homeward freight actually earned ought not to have been taken into the account at all, the arbitrator awarded that the verdict should be entered for the plaintiff, with 500*l.* damages; but, if otherwise, then with nominal damages only, there having been a breach of the agreement, by which, however, as events had turned out, the plaintiff had been a gainer."

Mr. Serjeant *Stephen*, in *Hilary* Term last, on the part of the plaintiff, obtained a rule *nisi* to set aside the award, on the ground that the arbitrator, in assessing the plaintiff's damages, ought not to have taken into consideration the amount of the freight earned from *Batavia*.

On cause being about to be shewn against this rule, the Court directed that the facts should be stated in a special case, in which the award was set out as above.

The case now came on for argument.

Mr. Serjeant *Stephen*, for the plaintiff.—The stipulations contained in the charter-party resolve themselves into this:—The agents of the charterers are, on the ship's arrival at *New Zealand*, to elect whether they will or will not put a cargo on board: if they did not load the ship, they were to be liable to a penalty of 500*l.* by way of dead

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freight; if they did load the vessel, they were to pay a certain price *per ton* for a full cargo. The event that has happened does not fall within the terms of the charter-party. The breach of contract with which the defendants are charged is, the non-performance of either of these stipulations. When the vessel arrived at *New Zealand*, and had waited the fourteen days, and the master found no person there to whom he could give notice, the owner had a vested right to recover the penalty mentioned in the charter-party. What has happened since to divest that right? The master, for the benefit of his owner, made a circuitous voyage home, by way of *Batavia*. The question is, whether the freight earned in that circuitous voyage shall be set off against the amount of dead freight, or, in other words, the penalty incurred by the defendant's breach of contract. The effect of the award is, an attempt to set off the earnings of the plaintiff's ship whilst in his own service, against the penalty. Upon what principle can this deduction or set-off be allowed? The vessel was thrown upon the plaintiff's hands at *New Zealand*, for profit and loss. At whose risk were the voyage to *Batavia*, the vessel's stay there, and her return to this country? Not the freighters', for it does not appear that the voyage was taken under the direction of any agent of theirs. If, therefore, the plaintiff sustained that risk, why is he not to have the benefit of the voyage? Besides, no allowance is made in the award for this increased risk.

[Lord Chief Justice *Tindal*.—That would be covered by "increased expenses."]

It could not have been so intended by the arbitrator. The owner had no notice of the extended voyage, and therefore could not insure the ship. Had the vessel been lost in going to *Batavia*, that loss must have been sustained by the plaintiff. Some allowance, therefore, ought to have been made to him for his increased risk.

There is no express decision applicable to the question;

but the case of *Bell v. Puller* (a) has a very strong bearing upon it. There, a ship was let to freight for a voyage from *London* to *St. Petersburg*, to take out a small cargo of lead, and to bring home a return cargo, for which freight was to be paid at eleven guineas *per* ton for the whole ship's admeasurement. If from political circumstances she should be unable to discharge her cargo, and consequently to obtain a return cargo, the freighters agreed to pay a gross sum, less than the amount of the freight *per* ton. The ship being prevented from discharging, and the freighter supplying no homeward cargo, the master took in goods on freight, and brought them home together with the lead. The Court held that he was entitled to receive the gross sum stipulated for, and also to retain the freight which the ship had earned. Lord *Mansfield* there said: "Considering this as a mere contract to bring certain goods to *England*, I see no reason why the captain may not earn what else he can by taking other goods on board for his own benefit. In common cases of charter-parties, there usually is a covenant that the freighter will supply a certain quantity of homeward freight at the foreign port; and, if he does not, the plaintiff has his action on the covenant against him. But, suppose, instead of leaving the damages open, he stipulates, if I cannot provide a cargo for you, I will pay you so much, would not the owner in that case have a right to take goods on board for his own account? His ship is at full liberty for him to make any other profit of; and in such a case he doubtless would insist on more or less liquidated damages, according to the chance he foresaw of getting freight home from the place where he was going; he would raise or lower his demand accordingly: and in such case I see no reason why the person who had stipulated to pay such liquidated damages, should be discharged from any part thereof on account

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(a) 2 Taunt. 285. And see *Blight v. Page*, 3 Bos. & Pull. 295, n.

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of the profit which the plaintiff might make by the cargo supplied by any other person."

Mr. Serjeant *Wilde, contra*, was stopped by the Court.

Lord Chief Justice TINDAL.—In this case, the charter-party has contemplated an event, upon the happening of which 500*l.* was to be paid by the freighters to the owner. The stipulation is, "that, in case the said ship should, according to the true intent and meaning of that charter-party, proceed to and arrive in *New Zealand*, and end her voyage there, the said freighters, their executors, administrators, or assigns, should and would, upon the receipt in *England* of a certificate to that effect from the superintendant or principal agent of the said company, or of the notice which should have been given by the said superintendant or principal or other agent, of his determination not to load the said ship as aforesaid, pay to the said plaintiff the sum of 500*l.* as and in full for the freight or hire of the said ship for the voyage which should be so ended." There is also a general stipulation for a return cargo. The event in which the plaintiff was to be entitled to the 500*l.* has never happened; it therefore seems to me that we are to put the same construction upon this charter-party as if it had contained no such stipulation. The question then is, whether this is not the simple case of an action for general damages for the breach of the charter-party, in not providing the vessel with a return cargo. The arbitrator has taken into his consideration the profit earned by the vessel on her homeward voyage; and, finding that homeward voyage to have been more profitable to the owner than would have been the strict voyage contemplated by the charter-party, he has given the plaintiff nominal damages only for the breach of the contract. It has been argued, on the part of the plaintiff, that he was at all events entitled to the 500*l.* agreed to be paid on the default of the defendants' agent to provide

a cargo at *New Zealand*. But, if the master of the vessel, on finding that no cargo was provided for him, had returned home in ballast, the *maximum* the plaintiff could have claimed would have been the 500% penalty. The homeward voyage has, however, placed him in a better situation. He could not be entitled to the penalty and also to the profits of the homeward voyage. Inasmuch, therefore, as the event which would have rendered the contract a close contract never happened, I am of opinion that it has become a general contract, on breach of which the plaintiff would be entitled to all the damages he had sustained by such breach. Upon the whole, I think that one shilling was the proper measure of damages, and consequently that the award of the arbitrator must stand.

Mr. Justice GASELEE.—I am of the same opinion. By the terms of the contract, the defendants were to load the ship, paying a certain rate of freight; and an option is given to them, in one case, to relieve themselves from that freight, and to be let off, on payment of the sum of 500%. In consequence, however, of their not having taken the step that was to have restricted their liability to the sum specified, the contract became a general contract, and they were answerable generally in damages for the breach of it. The contract cannot be open in one sense, and close in another. In the event of notice being given by the agent of the freighters of his determination not to load the ship with a homeward cargo, the defendants would have been liable for the 500% only: but, no such notice having been given, they were liable to general damages. It turns out, however, that the plaintiff has sustained no damage; he has got a more profitable cargo from *Batavia*, than he would have had if loaded by the defendants' agent at *New Zealand* under the terms of the charter-party. We must take into our consideration the whole circumstances of the voyage. The case of *Bell v.*

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Puller is not impeached by this decision. There, the event had happened upon which the defendant was to be liable to the extent of 500*l*.

Mr. Justice BOSANQUET.—I am of the same opinion. This was an action of covenant for the breach of an engagement contained in a charter-party. If the event has not happened, in which the plaintiff was to be entitled to recover the stipulated damages, he can only be entitled to general damages for the breach. The event provided for has not happened. If the defendants chose, they might have put an end to the voyage at *New Zealand*, in which case they would have been liable to the extent of 500*l*.; but, as that case has not arisen, the action is nothing more than an action of covenant for unliquidated damages. It has been contended that the plaintiff had a vested right to the 500*l*. penalty, upon the ship's arrival at *New Zealand*, and finding there no return cargo. I think, however, his right was not confined; he was entitled to recover all the damages he might have sustained in consequence of the defendants' breach of contract: but we must also take into account the profits derived from the voyage from *Batavia*. Upon that voyage it appears he has earned a much larger freight than he could have obtained in the event of the charter-party having been strictly fulfilled. The arbitrator finds, that, "after taking into consideration the delay in *New Zealand*, and that arising from the more circuitous voyage by *Batavia* to *England*, and the wear and tear of the ship, and the increased expenses of the homeward voyage arising therefrom, and setting on the other side the more valuable freight earned by the ship, than she would have earned by carrying home a full cargo from *New Zealand*, pursuant to the charter-party, the voyage from *New Zealand*, by *Batavia*, to *England*, was, on the whole, more profitable to the plaintiff than if the vessel had been fully loaded by the charterers at *New Zealand*

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Mr. Justice ALDERSON.—The view I took of the case was this:—The defendants were clearly guilty of a breach of contract; and I thought the plaintiff was entitled to recover all the damages he appeared to have sustained. Suppose a full cargo had been put on board at *New Zealand* by a third person; would the plaintiff have been injured by the breach of contract? In going to *Batavia*, the master acted for the interest of both parties. If any loss had happened, I should have awarded damages to the extent of that loss, whatever it might have been.

Rule discharged.

BAGNALL and Another v. ANDREWS.

Monday,
Nov. 29th.

THIS was an action of *assumpsit* on a bill of exchange drawn by one *Woodbridge* upon, and accepted by, the defendant, and indorsed by *Woodbridge* to the plaintiffs after a secret act of bankruptcy, which was subsequently followed up by a commission.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall*, after last *Hilary* Term. The facts were as follow:—At the time the bill in question was drawn, *Woodbridge* had an open account with the defendant for goods already sent, and which he was then in the

One *W.* drew a bill upon the defendant, to whom he was in the habit of consigning goods for sale. The bill was accepted, but neither party at the time knew the state of the account between them. It afterwards appeared that the balance of the account was consider-

ably in favour of the defendant at the time he accepted the bill:—*Held*, that, nevertheless, it was not an accommodation bill.

A trader, in a state of insolvency, and concealing himself from his general creditors, after a secret act of bankruptcy, in part payment of a debt delivered a bill of exchange to a creditor who was acquainted with his place of retreat, and with whom he was in friendly communication:—*Held*, that this was not a payment protected by the 82nd section of the statute 6 *Geo.* 4, c. 16.

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course of sending to him, for sale. Neither *Woodbridge* nor the defendant at this time knew the state of the account; but it afterwards appeared that *Woodbridge* had considerably overdrawn, and consequently was indebted to the defendant before the latter had accepted the bill in question.

On the part of the defendant, *Woodbridge* was called as a witness. His testimony was objected to on the ground of interest, the bill being, it was alleged, an accommodation bill, and he being under an obligation to the defendant, either express or implied, not only to pay the amount to him if the plaintiffs obtained a verdict, but also to indemnify the defendant against the costs of the action.

His Lordship, however, admitted the evidence, subject to leave to the plaintiffs to move to enter a verdict for the amount of the bill.

From this and other evidence, it appeared that, at the time the bill was given by *Woodbridge* to the plaintiffs, he was in a state of insolvency, and had absconded from his general creditors; that he had been in *London* for nearly three weeks, passing under two fictitious names; that he was frequently changing his place of abode, and expected to be arrested, and to have a docket struck against him: but, though concealing himself from his other creditors, he was in the habit of meeting and dining with one of the plaintiffs. It also appeared that the bill in question was the only property of which *Woodbridge* was at the time possessed; and that it was delivered to the plaintiffs in consequence of their urging him for payment of a large debt due to them; but that the delivery of the bill to them did not free *Woodbridge* from any pressure or difficulty.

His Lordship, upon this evidence, left it to the Jury to say, whether the transfer of the bill by *Woodbridge* to the plaintiffs was *bond fide*.

The Jury returned a verdict for the defendant.

Mr. Serjeant *Taddy*, in *Easter* Term last, obtained a rule *nisi* for a new trial upon the point reserved, and also on the ground that the transfer of the bill to the plaintiffs was a payment protected by the 82nd section of the statute 6 *Geo.* 4, c. 16.

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Mr. Serjeant *Wilde*, on a former day in this term, shewed cause.—The bankrupt *Woodbridge* had dealings with the defendant. There was a running account between them; and at the time the bill in question was accepted by the defendant, the latter supposed that the state of the account would warrant him in paying it. It however afterwards turned out, that, by reason of *Woodbridge's* bankruptcy, and of the non-delivery of certain goods by him to the defendant, the bill should have been taken up by *Woodbridge*, or that the defendant would, if he paid it, be a creditor of *Woodbridge*. Where a person accepts an accommodation bill, there is either an express or an implied promise on the part of the drawer to indemnify the acceptor against all liability in respect of it. But, where the bill is drawn with a reasonable expectation on the part of the drawer that it will be paid by the acceptor, the former would be entitled to notice of the dishonour of the bill, and there is no implied promise on his part to indemnify the acceptor. The evidence, therefore, of the bankrupt in this case was properly admitted, and affords an answer to the action.

The plaintiffs were not holders for a valuable consideration. The bill was given to them by the bankrupt after he had committed an act of bankruptcy, and under circumstances which preclude the supposition that it was a *bond fide* payment, or within the protection of the 82nd section of the 6 *Geo.* 4, c. 16, which only protects payment *bond fide* made in the ordinary course of business, and where bankruptcy is not contemplated.

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In *Thornton v. Hargreaves* (a) the security was given by the bankrupt to his creditor in consequence of a threat on the part of the latter.

Mr. Serjeant *Taddy*, in support of his rule.—The bankrupt was not an admissible witness. In one point of view, *viz.* in the case of a verdict for the defendant, he would only be liable to the defendant for the amount of the bill; whereas, in the event of a verdict for the plaintiffs, he would in addition be liable for the costs of this action. He was therefore clearly interested in the event of the suit. The bill being an accommodation bill, the bankrupt had a right to indorse it, inasmuch as no property in it would pass to his assignees. In *Willis v. Freeman* (b), a trader having securities in his banker's hands to a certain amount, after a secret act of bankruptcy drew on them a bill for a larger amount on the score of his *accommodation*, payable to his own order, which, after acceptance, he indorsed to the plaintiff (who knew of his partial insolvency, but not of the act of bankruptcy). A commission of bankrupt having been afterwards taken out—it was held that the plaintiff, who was to make title through the bankrupt's indorsement after his bankruptcy, though he were entitled to sue the acceptors upon the bill, yet could only recover on it *the amount of the sum accepted for the accommodation of the bankrupt* over and above the amount of the bankrupt's effects in the hands of the acceptors at the time of the bankruptcy; for which latter amount, and for which alone, they were liable to account in another form of action (not on the bill) to the bankrupt's assignees. Lord *Ellenborough*, in delivering the opinion of the Court, there said: "At the time this bill (for 1,400*l.*) was accepted, the defendants had in their hands, as *Anderson's* (the drawer's) bankers, bills of the

(a) 7 East, 544.

(b) 12 East, 656.

value of 888*l.* 16*s.* 8*d.*, not then become due; but they had no other effects. To that amount, therefore, their acceptance was *for value*; beyond that it was gratuitous, and merely for *Anderson's accommodation*. It may be considered as clear, that, except in cases provided for by particular statutes, a trader who has committed an act of bankruptcy, upon which a commission afterwards issues, can make no transfer of his property to the prejudice of his assignees, nor do any act to interfere with their rights; but every such attempted transfer or act is liable to be vacated by his assignees. On the other hand, when it does not affect the rights and interests of the assignees, the act of a man who has committed an act of bankruptcy has the same effect as the act of any other person. The question therefore for consideration here is, whether this indorsement by *Anderson*, if allowed to be effectual, could prejudice his assignees, or interfere with their rights; because, as far forth as it would do so, it is inoperative. The case of *Wilkins v. Casey* (a) has established, that, if a man who has funds in his hands belonging to a trader who has committed a secret act of bankruptcy, accept a bill for that trader, without knowing of such act of bankruptcy, he may apply those funds when the bill becomes due to the discharge of his own acceptance, though a commission of bankrupt may have issued in the interim, and will be protected against any claim the assignees may afterwards make upon him in respect of the funds so applied. To the extent, therefore, of the 888*l.* 16*s.* 8*d.*, it would prejudice the assignees to hold this indorsement valid; because it would destroy the claim of the assignees to that sum in the hands of the acceptors: and we have no difficulty in saying that *this part* of the plaintiff's demand cannot be supported. As to the surplus (511*l.* 3*s.* 4*d.*), had the bill been for that sum alone, the

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(a) 7 Term Rep. 711.

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case cited by the plaintiff of *Arden v. Watkins* (a), would be an authority in point, unless the late statute (b) has altered the law in this respect. The principle decided in *Arden v. Watkins* was this, that, if a man accept a bill for the accommodation of a trader who has committed a secret act of bankruptcy, and such bill be payable to the trader's order, the trader's indorsee will have a valid claim upon the bill against the acceptor, notwithstanding a commission of bankrupt shall have issued against such trader before the bill became due; because, as the trader himself could have had no right upon such bill against the acceptor, his assignees, who can in this respect stand in no better situation than the bankrupt whom they represent, could have no right upon it, supposing it had remained in his possession; and therefore his indorsement works no prejudice to them." In *Drayton v. Dale* (c), in *assumpsit* by the indorsee against the maker of a promissory note payable to *A. B.*, or his order, the defendant pleaded—first, *non assumpsit*—secondly, that *A. B.* became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to indorse the promissory note before the time of indorsement became vested in the assignees, whereby the indorsement by *A. B.* was void, and created no right in the plaintiff to sue. The plaintiff replied to the last plea, that the indorsement was made with the consent of the assignees. The rejoinder took issue upon that fact. A verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment upon the whole record—first, because the defendant, who had made the note payable to *A. B.*, or his order, was estopped from saying that *A. B.* was not competent to make an order—secondly, because

(a) 3 East, 317.

(b) 49 Geo. 3, c. 121, s. 8.

(c) 2 Barn. & Cress. 293; S. C. 3 Dow. & Ryl. 534.

the property acquired by a bankrupt subsequently to his bankruptcy, does not absolutely vest in the assignees, although they have a right to claim it; but, if they do not make any claim, the bankrupt has a right to such property against all other persons. In *Charles v. Marsden* (a) it was held, that it is not of itself a defence to an action by the indorsee of a bill of exchange, to plead that it was accepted for the accommodation of the drawer, without consideration. In the present case, it appears that there was a *bond fide* debt due from *Woodbridge* to the plaintiffs; and there is no case to shew that an indorsement of a bill for an antecedent debt is not an indorsement for value.

Then, this was a payment within the 82nd section of the 6 Geo. 4, c. 16. The words of that clause are not limited to payments strictly and closely within the term "payment;" but the giving of a bill is considered a payment. *Wilkins v. Casey*. In *Cash v. Young* (b), where *A.* bought goods of a trader who had previously committed an act of bankruptcy, and paid for them *bond fide* without knowledge of the bankruptcy; it was held that the assignees under a commission issued against the seller, could not maintain trover for the goods, the payment being protected by the 1 Jac. 1, c. 15, s. 14. And in *Hill v. Farnell* (c), where *A.* purchased of *B.*, a hop-merchant, a library, and paid him the value, *B.* having at the time committed an act of bankruptcy, of which *A.* had no knowledge; it was held that the assignees of *B.* could not recover the books, without at least tendering *A.* the price paid for them, the payment being protected by the 82nd section of the 6 Geo. 4, c. 16. These cases shew the liberality with which that clause of the statute is construed.

(a) 1 Taunt. 224.

(b) 2 Barn. & Cress. 413.

(c) 9 Barn. & Cress. 45; S. C. 3

Dow. & Ryl. 652.

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Lord Chief Justice TINDAL now delivered the judgment of the Court:—

In this case the Jury have found their verdict for the defendant, and the motion for setting aside that verdict and granting a new trial has been made on two grounds—*first*, that *Woodbridge*, the drawer of the bill, was inadmissible as a witness for the defendant—*secondly*, upon the ground that, on the evidence at the trial, the delivery of the bill to the plaintiffs was protected as a payment made to them under the 82nd section of the late bankrupt act, 6 Geo. 4, c. 16.

The objection made to *Woodbridge's* competency at the trial was, that the bill had been accepted by the defendant for the accommodation of the drawer, and consequently that he was under an obligation to him, either express or implied, not only to pay the amount to the defendant if the plaintiffs obtained a verdict, but also to indemnify the defendant against the costs of the present action. It might be granted that this consequence would have followed, and that *Woodbridge* would have been an incompetent witness for the defendant, on the authority of the cases referred to, if in point of fact the bill had been accepted for the accommodation of the drawer: but we think, upon the facts of the case, the bill was not an accommodation bill.

At the time it was drawn, *Woodbridge* had an open account with the defendant for goods already sent, and which he was in the course of sending to him for sale. The drawer might at that time reasonably expect that the acceptor would pay the bill out of funds that might be in his hands when the bill arrived at maturity; for, the evidence is express, that, at the time the bill was drawn, neither the drawer nor the acceptor knew the state of the account. A bill so drawn and so accepted cannot be treated as an accommodation bill; nor, consequently, is there any implied undertaking, on the part of the drawer, to indem-

nify the acceptor against the costs of any action which may be brought against him.

With respect to the second ground of motion, the only question is, whether, upon the evidence given at the trial, the Court see any reason to disturb the verdict. The Jury found a verdict for the defendant, at the same time stating expressly that the bill had been indorsed after an act of bankruptcy by the drawer, of which the plaintiffs had no notice. If the Jury still found their verdict for the defendant, it could only have proceeded on the ground that the delivery of the bill to the plaintiffs by the bankrupt, either was not a *bond fide* payment to them, or was a fraudulent preference of the plaintiff; in either of which cases the payment is not protected by the statute. And though this point was not specifically left to the Jury, it was involved in the evidence in the cause, and could be the only ground on which the verdict rests. Before, therefore, the Court send the case down to a new trial, they must see reason to expect that another Jury would come to a different conclusion. That the bankrupt, before and at the time he delivered this bill to the plaintiffs, was absconding from his general creditors, is clear. He had been in *London* for nearly three weeks—passing under two fictitious names—frequently changing his place of abode—expecting to be arrested, and to have a docket struck against him. But, although concealing himself from other creditors, he was dining with one of the plaintiffs. He delivered him the bill in question. That bill was all that he had at the time; and the delivery of that bill freed him from no difficulty in which he was placed.

It appears to us, that, if it should be left to another Jury to say whether this was a *bond fide* payment to the plaintiffs, they could not but find the same verdict. The payment of the bill being made *after* the act of bankruptcy, the burthen of shewing that it was a *bond fide* payment is cast upon the plaintiffs; and it would be enough to support

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the verdict, to say that they have at least left it in considerable doubt.

The ground on which we decide makes it unnecessary to give any opinion as to the question of sufficiency of consideration in this case. On the whole, we think the rule for a new trial must be discharged.

Rule discharged.

Wednesday,
 Nov. 29th.

MATTHEW BEARPARK v. HUTCHINSON and MARY, his
 Wife.

A rent-charge was granted to *B.* during the life of the plaintiff. The grantee died living the *cestui que vie*:—*Held*, that the right to the rent-charge vested in the plaintiff, as the personal representative of *B.*, the grantee.

THIS was an action of replevin for taking the cattle, goods, &c., of the plaintiff, in his close and dwelling-house.

The defendants avowed, that the plaintiff being seised for life, and *Dixon Bearpark* having the reversion in fee of the premises in which &c., conveyed them by indentures of lease and release to *Lupton Topham*, upon trust to permit and suffer the said *Dixon Bearpark* to receive and take thereout one clear annuity or yearly rent-charge of 60*l.* a year, by equal half-yearly payments, that is to say, on the 6th day of *April*, and the 10th day of *October*, in every year during the life of the said plaintiff; the first half-yearly payment to commence and to be made on the 10th day of *April* next ensuing the date of the said indentures; and, subject to the said annuity or yearly rent-charge, to the use of the said plaintiff and his assigns for and during the term of his natural life, without impeachment of waste; and, from and after the determination of that estate, by forfeiture or otherwise, in his life-time, to the use of the said *Lupton Topham*, his heirs and assigns, upon trust to support the contingent trust estates thereafter limited, and by the usual ways and means to preserve the same from being defeated or destroyed; but nevertheless to permit and suffer the said plaintiff and his assigns to re-

ceive and take the rents, issues, and profits thereof for and during the term of his natural life, for his and their own proper use and benefit. [Then followed limitations in remainder to *Dixon Bearpark* for life, and his children in succession.] And it was by the said last-mentioned indenture expressly provided (amongst other things), that, if the annuity or yearly rent-charge of 60*l.* should be behind or unpaid by the space of twenty-eight days next after either of the said days of payment, then it should be lawful for the said *Dixon Bearpark* and his assigns to enter upon the said dwelling-house and close in which &c., and the cattle and goods &c. there found to distrain and carry away, impound, or otherwise to sell and dispose of, according to law, till the annuity should be paid: By means whereof the said *Dixon Bearpark* became and was seised of and in the said yearly rent-charge of 60*l.* for the term of the natural life of the said plaintiff. And the said defendants further said, that the said *Dixon Bearpark*, on the 10th day of *February*, 1824, to wit, at &c., departed this life without having assigned over or parted with the said rent-charge after the death of him the said *Dixon Bearpark*, so accruing as aforesaid during the life of the said *Matthew Bearpark*; and that, after the death of the said *Dixon Bearpark*, administration of all and singular the goods and chattels, rights and credits, which were of the said *Dixon Bearpark*, who died intestate, in due form of law was granted to the said defendant *Mary*: By means of which said premises, the said defendants, in right of the same *Mary* as administratrix as aforesaid, became and were seised of the said rent-charge for the term of the natural life of the said plaintiff; and because 360*l.* of the said rent-charge (after the death of the said *Dixon Bearpark*, and after the making the said last-mentioned indenture, and the said plaintiff being living and in full life), for six years ending on the 6th day of *April*, in the year aforesaid, became due, owing, and in arrear to the said defen-

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dants, and because the said last-mentioned arrears of the said rent-charge were and remained behind and unpaid by the space of twenty-eight days next after the respective days of payment thereof, and from thence until and at the same time when &c. were in arrear and unpaid to the said defendants, they avowed the taking of the said cattle, goods, and chattels, in the said dwelling-house and closes respectively, in which &c., and justly &c., for and in the name of a distress for the said arrears of the said rent-charge.

The plaintiff pleaded, that, before any part of the rent-charge mentioned in the avowry became due, *Dixon Bearpark* died.

The avowants demurred, and the plaintiff joined in demurrer.

The demurrer now came on for argument.

The questions raised by the demurrer were—

First—Whether, inasmuch as the reservation of the rent-charge was to *Dixon Bearpark, pur autre vie*, without the words “executors or administrators,” it did not determine upon the death of *Dixon Bearpark*—

Secondly—Whether, inasmuch as the rent-charge was granted to *Dixon Bearpark, pur autre vie*, without the addition of the words “executors or administrators,” and taking the whole of the limitations contained in the deed by which the rent-charge was granted, the defendants could take as special occupants within the 29 *Car. 2, c. 3, s. 12*, and 14 *Geo. 2, c. 20, s. 9*—

Thirdly—Whether, supposing the rent-charge did not determine by the death of *Dixon Bearpark*, but extended to his administrators, they could distrain for it, so as to enable them to support their avowry.

Mr. Serjeant *Wilde*, in support of the demurrer.—A rent-charge granted *pur autre vie* is not determined by the

death of the grantee during the life of *cestui que vie*, but goes to the personal representatives of the grantee, by virtue of the statutes 29 Car. 2, c. 3, s. 12, and 14 Geo. 2, c. 20, s. 9. By the former, "for the amendment of the law in the particulars following," it is enacted, "that, from thenceforth, *any estate pur autre vie* shall be devisable by a will in writing, signed by the party devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and, if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a *special occupancy*, as assets by descent, as in the case of lands in fee simple; and, in case there shall be no *special occupant* thereof, it shall go to the executors or administrators of the party that had the estate thereof, by virtue of the grant, and shall be assets in their hands:" and by the latter enactment, it is made distributable as assets in the hands of those persons.

Considering this as a remedial law—an act in furtherance of justice—the Court will so construe it as shall best give effect to the remedy intended. But it will be urged, on the part of the plaintiff, that the statute 29 Car. 2, was only intended to apply to such estates as were susceptible of special occupancy; and that there cannot be a special occupant of a rent-charge.

Undoubtedly, in the literal sense, there can be no occupancy of a rent-charge; it is an incorporeal estate. A special occupant, strictly speaking, is one named in the grant as the party to occupy after the death of the grantee.

The statute 29 Car. 2, speaks of *all estates pur autre vie*, without any distinction. It appears from *Bacon's Abridgment* (a), where many of the cases upon the subject are

(a) Vol. 2, tit. "Estate for life, and Occupancy," (B. 3.).

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collected, that the learned editor of that work considered that the statute of frauds had entirely removed all those distinctions which had before existed upon the point. In *Doe d. Blake v. Luxton*, Lord *Kenyon* says (a): "These questions on estates *pur autre vie* do not frequently arise. Such estates certainly are not estates of inheritance; they have been sometimes called, though improperly, descendible freeholds; strictly speaking, they are not descendible freeholds, because the heir-at-law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor, he might have plead *riens per descent*, for these estates were not liable to the debts of the ancestor before the statute of frauds. That act made them chargeable in the hands of the heir, as assets by descent, if he took by reason of a special occupancy; and, if there be no special occupant, it directs that they shall go to the executors, subject to the debts of the testator; and the statute 14 *Geo. 2*, c. 20, renders them distributable as personalty." So, in *Kendal v. Michfield* (b), the statute of frauds was held to operate upon an estate not the subject of a special occupancy. In *Rawlinson v. The Duchess of Montague* and others (c), Lord Keeper *Harcourt* says: "If, since that statute [29 *Car. 2*, c. 3, s. 12], a rent be granted to *A.* for the life of *B.*, and *A.* die living *B.*, *A.*'s executors or administrators shall have it during the life of *B.*; for, the statute is not only made to prevent the inconvenience of scrambling for estates, and getting the first possession after the death of the grantee, but likewise for preserving and continuing the estate during the life of the *cestui que vie*: and it is reasonable, since the grantee might by deed have disposed of the rent during the life of the *cestui que vie*, that though, by his dying without having made any such disposition, in nicety of law

(a) 6 Term Rep. 291.

(O); 3 Barnardiston, 46.

(b) Vin. Abr. tit. "Mortgage,"

(c) 3 P. Wms. 264, n.

this estate would have determined, yet, by the statute, that interest which passed from the grantor ought to be preserved, and shall go to the executors or administrators of the grantee during the life of the *cestui que vie*. And the statute in this case does not enlarge, but only preserves the estate of the grantee." In *Hassell v. Gouthwaite*, Lord Chief Justice *Willes* says (a): "The law before the statutes seems to be clear, that there could be no general occupant of a rent, and for this reason, because there can be no entry on a rent, according to the rule laid down in *Co. Litt.* 41, that there can be no general occupant of any thing that lies in grant. But the books seem to agree that the heir might be a special occupant of a rent, though not properly called an occupant, but rather a person who takes by the express words of the grant, and therefore may most properly be called a special grantee or assignee." In *Westfaling v. Westfaling* (b), where a question arose as to whether an estate *pur autre vie* in the hands of a devisee, was liable for the debts of the testator, the Lord Chancellor said (c): "The second question is, whether estates *pur autre vie* are within the statute of fraudulent devises, and liable to pay the debts of the testator. As to the first, I am extremely clear it did not pass by the will; there is no authority that *an advowson* will pass by the word *lands*, though it will by the words *tenements and hereditaments*. Being then not devised, this brings it to the question whether, as subsisting in a legal estate, and no trust, it is assets; and I am clearly of opinion it is." His Lordship, after reading the 12th section of the statute 29 *Car.* 2, c. 3, further added: "The effect of this statute is, to make these estates devisable which were not so by the statute of 21 *Hen.* 8, of *Wills*."

In *Ripley v. Waterworth*, upon the usual decree for an account of the estate of a testator received by the defend-

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(a) *Willes*, 505(b) 3 *Atk.* 460.(c) *Ibid.* 464.

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ant, the executor, the Master reported (among other things) that the testator's late father was at the time of his death possessed of a lease for lives of certain premises. On exception taken to this report, "that, as to the leasehold estate for lives, the Master ought to have certified that the testator had a real or descendible estate and interest of freehold in the said several leasehold estates; and that the same belonged to, or descended upon, the heir-at-law"—Lord *Eldon* said (a): "It is impossible that the exception can be right in stating that it descended upon the heir. I always understood that this was a freehold; though the word 'descendible' has been inaptly applied to it (b); for, though he is described as heir, he does not take as such, but as a special occupant named in the grant. It must be taken either that the executor may be special occupant or not. If the reasoning to prove that he cannot, is sound, it follows that a grant to A., his executors and administrators, must be construed as if those latter words were not inserted. If so, it is directly within the statute of frauds and the other statute together; for then there is no special occupant whatsoever, and the statute of frauds will directly attach, and it will go to the executor or administrator, because there is no special occupant; and at least is personal estate to the extent of being assets." On a subsequent hearing, his Lordship further said (c): "I am clearly and decidedly of opinion that the last proposition of this exception, that these estates belonged to, or descended upon, the heir-at-law, cannot be maintained. In every view of it, and subject to all the difficulties belonging to the question, my opinion is, that, if the executor is not a trustee for the next of kin, or those taking under testament the personal estate, he has himself a better right than the heir." Mr. Justice *Blackstone*, in his *Com-*

(a) 7 Ves. 437.

(b) Co. Litt. 239.

(c) 7 Ves. 442.

mentaries (a), throws out an observation expressive of doubt; but that authority is clearly outweighed by the cases above cited, and is distinctly combated by Professor *Wooddeson* (b), and also in *Saunders* "On Uses" (c), in *Watkins's* "Principles of Conveyancing" (d), and in *Bythewood's* edition of *Noye's Maxims*.

An express power of distress is given by the terms of the grant.

Mr. Serjeant *Goulburn*, *contra*.—The statute cannot have any operation upon incorporeal hereditaments, inasmuch as they could not be the subject of any occupancy. There is only one case to be found in the books wherein this precise point has occurred, *viz.* the case of *Holden v. Smallbrook* (e), where it was held, that, if a rent be granted to *A.* during the life of *B.*, and *A.* die, living *B.*, the rent is determined; because "no occupant could be of it." There are many authorities to the same effect—*Crawley's* case (f), *Salter v. Butler* (g), *Viner's Abridgment* (h), *Comyns's Digest* (i). Lord *Coke* says (k), "there can be no occupant of any thing lying in grant." And it has been expressly determined that copyholds are not within the operation of the statute of frauds. *Zouch v. Forse* (l), *Smartle v. Penhallow* (m). In *Doe v. Martin* (n), Lord Chief Justice *De Grey* says: "The term special occupant is in such cases a very forced and improper phrase,

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(a) 2 Bl. Com. ch. 16, "Of title by Occupancy," p. 259.

(b) 2 Wood. 271.

(c) Vol. 2, page 306, n, where it is said, that, where a rent-charge *pur autre vie* is granted to one and his heirs, the heir takes *quasi special occupant*.

(d) "Of estates *pur autre vie*," p. 69.

(e) Vaughan, 199.

(f) Cro. Eliz. 721.

(g) Vaughan, 200; Cro. Eliz. 901; Moore, 664.

(h) Tit. "Occupancy," (C), (E).

(i) Titles "Estates," "Occupant."

(k) Co. Litt. 41. b.

(l) 7 East, 190, where all the authorities are collected.

(m) 1 Salk. 188; 6 Mod. 63.

(n) 2 Sir W. Blac. 1150.

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and I think there is great weight in what is said by *Vaughan* (a), that the heir takes it as a descendible freehold." In the case of *St. John's College v. Fleming* (b), the dean and chapter of *Carlisle* made a lease to *J. S.*, for three lives; *habendum* to him, his executors, administrators, and assigns—this was held to be a descendible estate, and to belong to the heir, and not to the executor. *Blackstone* says (c): "As, by the common law, no occupancy could be of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like (because, with respect to them, there could be no actual entry made, or corporal seisin had; and therefore by the death of the grantee *per autre vie* a grant of such hereditaments was entirely determined); so now, I apprehend, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For, the statutes must not be construed so as to create any new estate; or to keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by the law there was no owner, and which therefore was left open to the first occupant. When there is a residue left, the statutes give it to the executors and administrators, instead of the occupant; but they will not *create* a residue, on purpose to give it to either. They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner, of lands which before were nobody's; and thereby to supply this *casus omissus*, and render the disposition of law in all respects entirely uniform; this being the only instance wherein a title to a real estate could ever be acquired by occupancy." In *Ripley v. Waterworth*, Lord Eldon refers to the following passage in *Gwillim's* edition of *Bacon's Abridgment* (d)—"If a

(a) *Vaughan*, 201.

(b) 2 Vern. 320.

(c) 2 Bl. Com. 260.

(d) Vol. 2, p. 277.

lease be made of land to *J. S.*, his executors and assigns, during the life of *B.*, the executors of *J. S.* shall be the special occupants, if he dies in the life of *B.*; for, though it be a freehold, which in course of law would not go to executors, yet they may be designed by the particular words in the grant to take as occupants: and such designation will exclude the occupation of any other person; because the parties themselves who originally had the possession have filled it by this appointment"—“And,” says his Lordship, “the reasoning is analogous to rents, of which, being an incorporeal hereditament, there could be no special occupant. Therefore, if it was granted to *A.* during the life of *B.*, by the death of *A.* there is an end of the grant: but, if to the heirs, &c., then it is said the executor should be *quasi* occupant; that is, he should take under the appointment and designation of the grantor, the person having a right to designate who should take it.”

As, therefore, antecedently to the statute of frauds, there could be neither general nor special occupancy of a rent-charge, that statute does not apply, inasmuch as it was not intended to create any new estate, but only to operate upon the descriptions of estates then already known to the law.

Supposing, however, the Court should be of opinion that the statute did create this sort of anomalous interest, it does not follow that the personal representatives of the grantee are entitled to distrain. The power of distress must in all cases be strictly construed. The proviso here is, that, in case of default, “it should be lawful for the said *Dixon Bearpark* (the grantee), and his assigns, to enter upon the said dwelling-house and closes in which &c., and the cattle and goods, &c., there found, to distrain and carry away, impound, or otherwise to sell and dispose of, according to law, till the annuity should be paid.” This clearly gives no right of distress to executors or administrators.

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Mr. Serjeant *Wilde*, in reply.—A rent-charge is an estate susceptible, within the meaning of the statute of frauds, of special occupancy. Admitting the term to be an improper one, still the whole course of authorities proves that it was an expression commonly used in *Westminster Hall*, at the time of the passing of the statute, in the sense contended for on the part of the defendants; and, the statute being remedial, the Court will construe it with reference to the ordinary understanding of the phrase introduced into it. The sole reason why there can be no occupancy of a copyhold is, that the freehold is never out of the lord.

As to the power of distress, it was clearly the intention of the parties that the power should be co-existent with the rent-charge.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The point raised upon the pleadings in this cause for the consideration of the Court is this, whether, if a rent-charge be granted to a man during the life of another, and the grantee dies during the life of *cestui que vie*, the right to the rent-charge vests in the personal representative of the grantee.

At common law, before the statute 29 Car. 2, c. 3, it seems to be the better opinion that such a rent-charge would have *determined* by the death of the grantee; because there is no one to take under the grant (*a*). But the question is, whether, since the statute above referred to, the executor of the grantee cannot make title to the rent-charge during the continuance of the life of the *cestui que vie*.

The 12th section of that statute enacts, that, *for the amendment of the law* in the particulars following, from

(*a*) 1 Salk. 188; Vaughan, 199.

thenceforth, *any estate pur autre vie* shall be devisable by a will in writing, executed as therein mentioned; and, if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in case of lands in fee-simple; and, in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

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The clause in question is expressly passed for the *amendment of the law*; denoting by that expression that there was some general inconvenience in the law as it then stood, with respect to the estate of tenant *pur autre vie*. That clause, therefore, is to receive a liberal construction; and the provisions of the act are to be extended, as far as the words of the act will admit, to every case where the subject matter of the clause calls for a remedy.

The clause contains two provisions: one declaring estates *pur autre vie* to be devisable; the other making them assets in the hands of the heir, or of the executors or administrators.

With respect to the first provision, it declares *any estate pur autre vie* to be devisable. It will be impossible to contend that the grantee of a rent-charge *pur autre vie* had not an estate *pur autre vie* in the rent-charge, or that the inconvenience of such grantee being unable to devise his interest, is not as great as that of the tenant *pur autre vie* in lands. It must be conceded, therefore, that an estate *pur autre vie* in a rent-charge, falls within the first branch of the section, and is devisable. But, if it is comprehended within the first branch, it is extremely difficult to put any construction on the second branch, so as to exclude it from that section also; for, the section goes on thus—"And, if no such devise *thereof* be made, the same shall be chargeable, &c."—evidently intending that the

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second branch of the section shall be as comprehensive as the first, and shall relate precisely to the same subject matter. And if this be the true construction, the second branch would govern estates *pur autre vie* in rents, as well as in any lands or tenements; and such estates would pass to the personal representative of the grantee, where the heirs are not named in the grant.

The argument on the part of the plaintiff is, that the second part of the section is not to be applied to all estates *pur autre vie*; but that it is limited and restrained to such estates as were before the statute capable of occupancy; and that, as there could be no occupant of a rent-charge, inasmuch as it lay only in grant, and was not capable of actual possession, so such estate was not within the statute.

It may certainly be conceded that there could not be any *general occupant* of a rent, for the reasons above assigned: that is, if the rent were granted precisely as in the present case, without any mention of heirs, that no stranger could claim the enjoyment of it (a); but it is laid down by Lord Coke, and supported by other authorities, that, both in annuities, and in any other thing that lieth in grant, there may be a *special occupant* (b).

Now, whether the expression *special occupant* is strictly proper, or is used by way of analogy only, as descriptive of the person, not who should occupy or enter upon, but who should receive or take rent, is immaterial; it is enough to say, the special occupant of rent was a legal phrase known and in use long before and at the time the statute of frauds was passed. Even Lord Chief Justice Vaughan, when arguing that the rent determines on the death of the grantee, uses the expression, "that, if rent be granted to a man and his heirs during another's life, the heir shall have it, not as a special occupant (as the common expres-

(a) Co. Litt. 41. b. (b) Co. Litt. 388. a.; Moore, 664; Willes, 505.

sion is), but as a descendible freehold"—thereby admitting the phrase of a special occupant of rent to be one in common use, and possessing a known meaning.

But the limitation or restriction in the statute applies only to such estates whereof there could by law be a *special occupant*. "In case there be no special occupant thereof," says the statute, "then it shall go to the executors or administrators of the party who takes the estate by the grant." The sounder construction of the second branch of the statute is, therefore, to make it include the grantees of rents, as such estates were in common parlance to be the subject of *special occupancy*; and this is, at the same time, more consonant to the construction of the whole section, which seems to require that the same subject matter as is made devisable, should also be made to vest in the personal representatives, if not devised, and if no special occupant is named in the original grant. And this interpretation of the act, if it can be drawn from the words, is evidently more consistent with the spirit and intention of the statute; for, if it was inconvenient in the case of tenancy *pur autre vie* in land, that a stranger might enter and enjoy it upon the death of the tenant, living *cestui que vie*, it was equally inconvenient, that, in case of a grant of rent, upon the death of the grantee, living *cestui que vie*, the tenant of the land should continue to hold it without paying the rent to any one.

We think, therefore, that the present case is governed by the statute; and our opinion is confirmed by the decision of Lord Keeper *Harcourt*, in the case of *Rawlinson v. The Duchess of Montague and Others* (a), and of Lord Chief Justice *Willes* (b).

With respect to the second objection taken in the argument, as to the power of distress, it becomes unnecessary

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(a) 3 P. Wms. 264, n.

(b) Willes, 505.

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to consider it, as the terms of the grant continue that power during the life of *cestui que vie*.

On the whole we give judgment for the defendants.

Judgment for the defendants.

Friday,
Nov. 26th.

Testator devised all his real and personal estate 'unto the heir-at-law of Mrs. R., of B., in the county of P.;" and, in case such heir-at-law should die without issue, then "to the next heir-at-law of the said Mrs. R., and his or her issue." Mrs. R., of B., was living at the time of the death of the testator:—*Held*, that the eldest son of Mrs. R. took an estate tail in the real estates devised by the will, as heir-at-law.

CARNE and MARY, his Wife, v. GEORGE ROCH, the younger.

THE following case was, by the direction of his Honor, the Vice-Chancellor, submitted for the opinion of this Court:—

" *John Thomas*, late of *Brawdy*, in the county of *Pembroke*, Esq., was, at the time of making his will hereinafter stated, and at his death, seised of freehold estates in the county of *Pembroke*.

" The said *John Thomas* made his will so executed and attested as is by law required to pass freehold estates by devise, and bearing date the 27th day of *March*, 1823, in the words following:—

" " This is the last will and testament of me, *John Thomas*, of *Ewston*, in the parish of *Brawdy*, in the county of *Pembroke*, Esq.—I direct that all my just debts, and particularly a list or memorandum of debts signed *John Thomas* to this my will annexed, which said debts I expected the late Mr. *Herbert Lloyd* had long since paid, and all my funeral expenses, and the charges of the probate of this my will, be in the first place fully paid and satisfied; and to the payment whereof, and of the legacies hereinafter bequeathed, I subject and make liable all my estate both real and personal. I give, devise, and bequeath all my real and personal estate of every description which I die

possessed of, unto the heir-at-law of Mrs. *Roch* of *Butterhill*, in the county of *Pembroke*, formerly Miss *Mary Jones*, of *Llether*; and, in case such heir-at-law should die without issue, then I give and devise the same to the next heir-at-law of the said Mrs. *Roch*, and his or her issue; and, in case all the children of the said Mrs. *Roch* should die without issue, then I give, devise, and bequeath all my said real and personal estate of every description unto *David Williams*, Esq., late a surgeon in the army, and living or lately living at *Kidwelly*, in the county of *Caermarthen*, to him and his heirs for ever. I also give and bequeath the sum of one shilling to my sister Mrs. *Mary Carne*, for her unnatural behaviour to me, and in particular for filing a bill in *Chancery* against me without any just cause. I also give and bequeath unto my friend *John Willy*, of *Haverfordwest*, Esq., the sum of fifty pounds, and I desire it to be understood that I should have left him more, but on account of the hardness of the times. And I desire my executor hereinafter named to give my servants mourning who shall be living with me at the time of my death. And I do hereby appoint *George Roch*, of *Butterhill*, in the county of *Pembroke*, Esq., executor of this my will and testament.'

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"The testator departed this life, without revoking or altering his will, on the 9th day of *February*, 1826; and he left the plaintiff, *Mary Carne*, his only sister, and sole heiress-at-law, surviving him.

"The person in the said will named and described as 'Mrs. *Roch*, of *Butterhill*, in the county of *Pembroke*, formerly Miss *Mary Jones*, of *Llether*,' was living at the time of making the said will, and of the death of the said testator, and is still living.

"The defendant in this case was, at the time of making the testator's will, and at the time of the said testator's death, the eldest son of the said Mrs. *Roch*, of *Butterhill*."

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The question for the opinion of the Court was—

“Whether the defendant, *George Roch*, as the eldest son of Mrs. *Mary Roch*, of *Butterhill*, named in the said testator’s will, took any and what estate and interest in the real estates devised by the said will to her heir-at-law.”

The case now came on for argument.

Mr. Serjeant *Stephen*, for the plaintiff.—

This case depends mainly upon the construction of two plain legal principles—*First, nemo est hæres viventis—secondly*, that, in the case of an immediate devise, the devisee must be *in esse* at the time, otherwise the devise is void.

It is stated in the case, that Mrs. *Roch* “was living at the time of making the will, and of the death of the testator, and is still living.” The devise is, to her *heir-at-law*. Now, she, being alive, could have no heir-at-law; consequently, there is no person in whom the devise can take effect. The case of *Doe d. Winter v. Perratt* (a) may be said to have consolidated all the authorities upon this subject. Though not exactly in point, it involves principles intimately connected with the present question. There, the testator devised his real estates to certain persons for life, and then “to *J. C.*, or his male heir, if any, free land, not to be sold or mortgaged; and if no male heir lawfully begotten by the said *J. C.*, then the above lands to fall to the first male heir of the branch of my uncle *R. C.*’s family; yielding and paying unto such of the daughters of the aforesaid *R. C.* who shall then be living, the sum of 100*l.* each at the time of the taking possession of the aforesaid estates.” *R. C.* was dead when the will was made, leaving five daughters, but no son; the eldest of those daughters had four daughters, but no son; all the others had sons,

(a) 5 Barn. & Cress. 48; S. C. 7 Dow. & RyL 733.

and all these were well known to the testator. *J. C.* died without issue. The fourth daughter of *R. C.* died before any of her sisters, and before the expiration of the life estates. It was held—*per* Mr. Justice *Holroyd* and Mr. Justice *Littledale*, Lord Chief Justice *Abbott* *absente*, Mr. Justice *Bayley* *dissentiente*—that such son came within the description of “first male heir of the branch of *R. C.*’s family,” and was entitled to the estate. In *Scatterwood v. Edge* (a), which is the only case not mentioned in the preceding, a devise to the first son of *A.* (*A.* having none at that time) was held to be void. Mr. Justice *Powell* there said: “A devise to *A.*’s first son does not import notice in the deviser that *A.* has no son. It may as well be said a devise to the heirs of *J. S.*, a person living, is good, because the testator knew he was alive, and therefore meant a future devise.” So, in *Goodright v. Cornish* (b), the Court resolved—“that, if one devise his estate to the heir of *J. S.*, and *J. S.* is living, the devise shall not be construed an executory devise, and such a devise is therefore void; but, if it were to the heir of *J. S.* after the death of *J. S.*, that is good as an executory devise.” In *Doe d. Winter v. Perratt*, Mr. Justice *Littledale*, after referring to several authorities, says (c): “All these cases, therefore, only come to this, that, if there be sufficient upon the will to shew that the word heir is used in the will in such a way as proves the testator to have meant heir apparent, it shall be so considered as he intended it; but they establish nothing more.” It may be admitted that the word heir may be used in a will, not in its absolute legal sense, but as a *designatio personæ* merely (d); but there must be manifest demonstration on the face of the will so to control the sense of the words used.” In *Buck v. Norton* (e), Lord Chief

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(a) 1 Salk. 229.

(b) 1 Salk. 226.

(c) 5 Barn. & Cress. 64.

(d) *Goodright d. Brooking v. White*, 2 Sir W. Blac. 1010.

(e) 1 Bos. & Pul. 57.

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Justice *Eyre* says: "Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note in *Hobart* (a), there be *demonstration plain* of an intent to use them in a different sense." In *Hodgson v. Ambrose* (b), Mr. Justice *Buller* said: "If a testator make use of legal phrases, or technical words *only*, the Court are bound to understand them in the legal sense. They have no right nor power to say that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by the law."

There is nothing upon the face of the will to shew that the testator knew Mrs. *Rock* to be living at the time of the devise. He appears evidently to have been in complete ignorance as to the state of the family generally; and even had no knowledge of the sex of the second child of Mrs. *Rock*.

Mr. Serjeant *Russell*, *contra*, was stopped by the Court.

The following certificate was afterwards sent to his Honor, the Vice-Chancellor:—

"We have heard this case argued by counsel, and have considered it; and we are of opinion that the defendant *George Roch*, as the eldest son of Mrs. *Mary Roch*, of *Butterhill*, named in the testator's will, took an estate tail in the real estates devised by the said will, as heir-at-law.

N. C. TINDAL,
S. GASELEE,
J. B. BOSANQUET,
E. H. ALDERSON."

(a) Hob. 33. The note alluded to is as follows—"No man shall shew me a case in law where by purchase by devise to an heir

any may take that is not heir indeed, without *declaration plain*."

(b) Doug. 337. And see *Pugh v. Goodtitle*, 3 Bro. P. C. 454.

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Monday,
Nov. 29th.

BREACH v. CASTERTON and four Others.

THIS was an action of trespass for an excessive distress. The cause came on as undefended, and a verdict was found against *Casterton*, and for the other four defendants.

Mr. Serjeant *Taddy*, on a former day in this term, on behalf of *Casterton*, obtained a rule *nisi* for a new trial, on payment of costs, upon an affidavit stating that his attorney had been obliged to go to *Ireland*; that he had intrusted the conduct of the cause to his clerk, through whose inattention and misconduct it had been suffered to be called on as an undefended cause; and that the defendant *Casterton* had a good defence to the action, upon the merits.

Mr. Serjeant *Wilde* now shewed cause.—He referred to *Parker v. Gordon* (a), to shew that a new trial cannot be had in a case where a verdict has been entered for one or more of several defendants, and against others.

Mr. Serjeant *Taddy* was heard in support of his rule.

Lord Chief Justice TINDAL.—The affidavit of the motion should at least have stated that the application was made with the consent of *all* the defendants. We cannot allow those defendants who have obtained a verdict to be inconvenienced by being again put to their defence, merely because the attorney has thought fit to leave the management of the cause in his absence in insufficient or unskilful hands. If we were to grant new trials upon such slight grounds, every cause would be twice tried; parties would lie by, and speculate upon the chance of a small verdict in the first instance, and then, if dissatisfied, apply for a new trial. Besides, we have already, in this term, refused a similar application (b).

Rule discharged.

(a) 2 Str. 814. (b) See *Masters v. Barnewell*, 7 Bing. 224, n.

A verdict having passed against one of five defendants in an action of trespass, the cause being, in consequence of the absence from town of his attorney, and the inadvertence of the clerk, taken as undefended—The Court refused to grant a new trial, even on payment of costs, and although it was sworn that there was a good defence on the merits.

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A defendant having been arrested a second time for a sum which had been demanded in a former action, wherein he had before been held to special bail, and the plaintiff had obtained a verdict for a part of his demand, and costs—The Court ordered the defendant to be discharged, on filing common bail.

HAMILTON v. JONES, PITT, and Another.

THIS was an action by an attorney for business done for the defendants, assignees under a commission of bankruptcy. At the trial of the cause, no evidence was offered in support of a sum of 42*l.* claimed by the plaintiff, no bill thereof having been delivered, in pursuance of the statute 2 Geo. 2, c. 28, s. 23, one month before the commencement of the action, which the Lord Chief Justice held to be necessary to entitle the plaintiff to recover. Some further deductions being made, the plaintiff had a verdict for 15*l.* only.

The defendant *Pitt*, having been again arrested for the 42*l.*, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why he should not be discharged out of custody on filing common bail; and—

Mr. Serjeant *Adams* also (on behalf of *Pitt*), on a former day, obtained a rule *nisi* for costs under the 43 Geo. 3, c. 46, s. 3, on the ground that he had been arrested and held to bail, without reasonable or probable cause, for a larger sum than was subsequently found to be due to the plaintiff.

Mr. Serjeant *Taddy* now shewed cause against the first-mentioned rule.—He referred to *Tidd's Practice* (a), where all the authorities upon the subject are to be found; and he contended that it was for the Court to say whether, upon the whole facts of the case, the second arrest was vexatious or not.

Mr. *Pitt* (in person), *contra*, was stopped by the Court.

(a) 9th Edit. p. 174.

Lord Chief Justice TINDAL.—I think this rule ought to be made absolute. The general rule upon the subject in question is, that a defendant cannot be held to bail a second time for any part of the demand included in a former action, where the plaintiff has obtained costs in such former action. In the present instance, it appears that a sum of 42*l.* formed part of the amount for which the defendant was arrested in the first action; and that, from some circumstance arising at the trial, no evidence was given in support of that part of the demand; and (as far, at least, as we can at present see) the plaintiff has got his costs. The defendant has been again arrested for this sum of 42*l.* This is not like the cases cited, where the plaintiff had been mulcted in the first instance.

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The rest of the Court concurring—

Rule absolute.

Mr. Serjeant *Taddy* now shewed cause against the second rule—for costs under the 43 *Geo.* 3, c. 46, s. 3.—He referred to the case of *Crowder v. Davis* (a), where the Court of *Exchequer* held that an attorney's bill for business in bankruptcy need not be delivered one month before action brought, pursuant to the statute 2 *Geo.* 2, c. 23, s. 23; and submitted, that, but for the erroneous ruling of the Lord Chief Justice, the plaintiff would have had a much larger verdict.

A bill of costs for business done under a commission of bankruptcy, need not be delivered, signed by the attorney, a month before action brought thereon.

Lord Chief Justice TINDAL.—The question here is, whether, upon the affidavits before the Court, we can see whether the plaintiff on this occasion had or had not reasonable or probable cause to cause the defendant *Pitt* to be arrested and held to bail for the sum of 78*l.* At the

(a) 3 *Younge & Jervis*, 433.

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trial of the cause, it appeared, that, as to 42*l.*, part of the plaintiff's demand, no bill had been delivered previously to bringing the action, pursuant to the statute 2 *Geo. 2*, c. 23, s. 23: that sum, therefore, was thrown out of the case. Under these circumstances, I am not prepared to say that the plaintiff might not reasonably and probably think he was entitled to hold the defendant to bail for the 42*l.*; more particularly as the Court of *Exchequer* has lately held, that an attorney's bill for business in bankruptcy need not be delivered a month before action brought, nor taxed by the commissioners under the 6 *Geo. 4*, c. 16, s. 14, before a party is sued thereon. I am therefore of opinion that this rule should be discharged.

The rest of the Court concurring—

Rule discharged.

IN THE EXCHEQUER CHAMBER.

ALEXANDER v. ANGLE.

[*In Error*].

A count for slander, after an inducement that one *J. P.* had become a bankrupt, and that the plaintiff was

THIS was an action on the case for slander. The declaration consisted of six counts.

The inducement in the first count alleged that the plain-

about to prove a debt justly due to him by *J. P.* under a commission theretofore awarded against him, charged the defendant with saying, in a certain discourse had with the plaintiff of and concerning the matters in the introductory part of the count mentioned, and of and concerning him in his trade of a livery-stable keeper—"You (meaning the plaintiff) are a regular prover under bankruptcy (meaning that the plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy):"—*Held*, that, the *innuendo* being larger than the natural meaning of the words, the count was ill, for want of an averment that it had been the practice of the defendant, by the words complained of, to impute the proof of fictitious debts under commissions of bankruptcy:—*Held*, also, that, as the words conveyed no imputation upon the plaintiff in the way of his trade, they were not in themselves actionable.

tiff below was a keeper of livery-stables, and carried on the trade and business of a livery-stable keeper.

The last count stated, that whereas also, before the time of the committing of the grievances thereafter next mentioned, one *John Peer* had become a bankrupt, and the plaintiff was about to prove a debt justly due to him by the said *John Peer*, under a commission of bankrupt theretofore awarded and issued against the said *John Peer*; yet the defendant, well knowing the premises, but contriving to injure and damnify the plaintiff, and to cause it to be suspected and believed as aforesaid, on &c., at &c., in a certain discourse which he, the defendant, then and there had with the plaintiff, of and concerning the plaintiff, and of and concerning the matters in the introductory part of this count mentioned, and of and concerning him in his trade aforesaid, then and there, in the presence of divers good and worthy subjects of this realm, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the matters last mentioned, these other false, scandalous, malicious, and defamatory words following, that is to say, "You (meaning the plaintiff) are a regular prover under bankruptcy (meaning that the plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy); you are a regular bankrupt maker; if it was not for some of your neighbours, your shop would look queer. It is all true, and you may bring as many actions against me as you like." By means of the committing of which said several grievances by the defendant as aforesaid, he the plaintiff had been and was greatly injured in his good name, fame, and credit, and in his said trade and business, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this realm, insomuch that divers of those subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, have, on occasion of the commission of the said

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grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the plaintiff to have been guilty of theft and dishonest practices, and to be in embarrassed circumstances, and likely to become insolvent, and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still did refuse, to have any transaction, acquaintance, or discourse with him the plaintiff, as they were before used and accustomed to have, and otherwise would have had.

At the trial, a general verdict was found for the plaintiff below, and, judgment having been entered up thereon, the defendant below brought a writ of error assigning for causes—that the words alleged in the last count were not actionable; that they conveyed no certain charge against the plaintiff below, of any indictable offence; and that the second *innuendo* therein was laid too largely, and was not warranted by any prefatory or other matter stated or alleged on the record.

Mr. *Platt*, for the defendant below, was stopped by the Court, who called upon—

Mr. *F. Kelly*, to support the count.—The objections to the last count are—*first*, that the words in question do not impute to the plaintiff in error any distinct offence punishable by law—*secondly* that the *innuendo* is too large, and is not warranted by any antecedent matter.

Although the words do not (unexplained) seem to impute to the plaintiff below any specific offence; yet from the context, the construction put upon them by the *innuendo* may be inferred; and it was for the Jury to say whether or not they were intended to bear that construction. In a note to the case of *Croft v. Boite (a)*, it is said: “It

(a) 1 Wms. Saund. 242.

is an established rule, that slanderous words must be understood by the Court in the same sense as the rest of the world would ordinarily understand them:" and the cases of *Woolnoth v. Meadows* (a) and *Roberts v. Camden* (b) are cited in support of this position. Here, the slanderous words amount to a charge of perjury; for, the 46th section of the 6 Geo. 4, c. 16, requires that the proof of debts under commissions of bankruptcy shall be made on oath.

Besides, the words were spoken of the plaintiff in the way of his trade, and were in that sense calculated to injure him. Words which charge a man with being insolvent, or with malpractice in trade, or keeping false books, and the like, are clearly actionable. *Comyns's Digest* (c).

Lord Chief Justice TINDAL.—The plaintiff in error contends that one count of the declaration in this case is bad in law; and therefore, that, as a general verdict has been found for the plaintiff below, and the damages are entire, the cause must go down again to trial on a *venire de novo*. We are of opinion that the last count is bad in law. The declaration begins with stating that the plaintiff below, before the committing of the grievances thereafter mentioned, carried on the trade and business of a livery-stable keeper. The count in question then goes on to allege that one *John Peer* had become a bankrupt, and the plaintiff below was about to prove a debt justly due to him by the said *John Peer*, under a commission of bankrupt theretofore awarded and issued against the said *John Peer*; and that the defendant below, in a certain discourse which he had with the plaintiff below of and concerning the matters in the introductory part of that count mentioned, and of and concerning him in his trade aforesaid, uttered these false and

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(a) 5 East, 463.

(b) 9 East, 93.

(c) Tit. "Action on the case for Defamation," (D.) pl. 25, 26, 27.

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defamatory words—"You are a regular prover under bankruptcy (meaning that the plaintiff below was accustomed to prove fictitious debts under commissions of bankrupt); you are a regular bankrupt maker; if it was not for some of your neighbours, your shop would look queer. It is all true, and you may bring as many actions against me as you like."

On the part of the plaintiff in error, it is contended that this count is insufficient, inasmuch as the words imputed to him do not contain any direct reflection upon the defendant in error in the way of his trade, nor do they convey a charge of a criminal nature. On the other hand, it is insisted, that, coupled with the finding of the Jury, the words in question do amount to a libel on the defendant below in the way of his trade, and import a charge of perjury. It does not appear to me that the present falls within that class of cases wherein it has been held that words conveying an imputation upon a person in the way of his trade are actionable; for instance, reflecting upon the skill of a carpenter, by saying he is a bungling workman; or upon the character of a vendor of goods, by saying his articles are unwholesome, or that he keeps false books, or is insolvent, or unworthy of credit: but the words alleged to have been spoken in this case might apply equally to a person not in trade as to one in trade. As to whether the words impute to the plaintiff below a crime punishable by law, it is to be observed that the *innuendo* is much larger than the natural and ordinary sense of the words spoken. The rule is clear, that the words of a libel cannot be enlarged beyond their natural meaning, unless connected with and explained by the *colloquium*. This rule is well laid down in the case of *Hawkes v. Hawkey* (a), where, in an action for slander, the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against

(a) 8 East, 427.

him in the Court of *Exchequer* by the defendant (but did not proceed to aver any *colloquium* respecting that answer, with reference to which the words were spoken); and then alleged that the defendant said of him that he was forsworn, *innuendo*, that the plaintiff *had perjured himself* in what he had sworn in his aforesaid answer to the said bill so filed against him—it was held that the *innuendo* could not, without the aid of such a *colloquium*, enlarge the sense of the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in. So, here, the *innuendo* cannot be supported without a previous averment to warrant it. In the cases cited, of *Woolnoth v. Meadows*, and *Roberts v. Camden*, it was apparent upon the face of the record that the words imported the allegation of a crime; the actions might therefore be maintained without the aid of any *innuendo*.

For these reasons, we think there should be a *venire de novo*.

Venire de novo (a).

(a) Where that which is complained of in the declaration as a libel, does not upon the face of it apply to the plaintiff and import a libel, it is necessary, by induce-

ment, to state such facts as will support an *innuendo*, and shew the libellous application of the statement to the plaintiff. *Hall v. Blandy*, 1 Younge & Jervis, 480.

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Thursday,
Nov. 27th.

NEWBERRY and Another v. COLVIN and Another.

[In Error].

The defendants below (ship-owners) chartered a vessel to one B., on a voyage to *Calcutta* and back, stipulating (among other things), that B. should have the command of the vessel; and that the crew and all the ship's stores should be provided by the owners—B. paying a freight of 25s. per ton, per month, part to be paid in cash on executing the charter-party, other part by bills on *Calcutta*, and the balance to be secured by the transmission of the bills taken for the homeward freight to certain persons in *London*, in trust to pay thereout such balance as might be due to the owners, and to pay the residue to B. And it was further

THIS was an action on the case against the defendants below (the plaintiffs in error), as owners of the ship *Benson*, for the loss of goods shipped by the plaintiffs below (the defendants in error) in *India*, to be conveyed to *England*.

The first count of the declaration stated, that the defendants (below), before and on the 11th *March*, 1817, were owners of the ship *Benson*, whereof one *George Betham* was master, and which ship or vessel was then riding at anchor in parts beyond the seas, to wit, in the river *Hooghly*, in the *East Indies*, and bound on a voyage from thence to the port of *London*; and that, the defendants (below) so being owners of the said ship or vessel as aforesaid, the plaintiffs (below), on &c., in the river *Hooghly* aforesaid, shipped and loaded, and caused to be shipped and loaded in and on board of the said ship or vessel, whereof the said *George Betham* then was master, divers goods and merchandizes, to wit, 2171 bags of sugar, and 191 chests of indigo, of them, the plaintiffs (below), then being in good order and well conditioned, and of a large value, to wit, of the value of 20,000*l.* of lawful money of *Great Britain*, to be taken care of and safely and securely carried and conveyed in and on board of the said ship or vessel from the river *Hooghly* aforesaid to the port of *London* aforesaid, and there, to wit, at the port of *London* aforesaid,

provided, that an agent should be put on board by the owners, who should have the sole management and superintendence of the ship's stores and provisions; and that, if B. should be guilty of any breach of the charter-party, it should be lawful for such agent to appoint another commander. The plaintiffs below (with knowledge of the above charter-party) shipped goods on board the vessel in the *East Indies*, for *London*. These goods were never delivered pursuant to the bills of lading:—*Held*, that B. alone was responsible to the shippers for such non-delivery, he being owner of the vessel *pro hac vice*.

said, to be safely and securely delivered, in the like good order and well conditioned, to certain persons commonly called and known by the name, and using the stile and firm of Messrs *Baxett, Farquhar, Crawford, & Co.*, or to their assigns (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted), for certain freight and reward payable by bills in that behalf; and although the said goods and merchandizes were then and there had and received by the said *George Betham*, so being master of the said ship or vessel as aforesaid, in and on board the said ship or vessel in the river *Hooghly* aforesaid, to be carried, conveyed, and delivered as aforesaid, yet the defendants (below), so being owners of the said ship or vessel as aforesaid, not regarding their duty as such owners, but neglecting the same, and contriving and wrongfully and unjustly intending to injure the plaintiffs (below) in this behalf, did not nor would take care of and safely or securely carry or convey the said goods or merchandizes, or cause the same to be carried and conveyed in and on board of the said ship or vessel, or otherwise, from the river *Hooghly* aforesaid to the port of *London* aforesaid, nor there, to wit, at the port of *London* aforesaid, safely or securely deliver the same, or cause the same to be delivered to Messrs. *Baxett, Farquhar, Crawford, & Co.*, or to their assigns, although the defendants (below) were not prevented from so doing by the act of God, the King's enemies, fire, or other dangers or accidents of the seas, rivers, or navigation, of any nature or kind soever; but, on the contrary thereof, they, the defendants (below), so being owners of the said ship or vessel as aforesaid, so improperly behaved and conducted themselves with respect to the said goods and merchandizes, that, by and through the mere carelessness, negligence, misconduct, and default of the defendants (below) and their

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servants in this behalf, a great part of the said goods and merchandizes, being of great value, to wit, of the value of 10,000*l.* of like lawful money, became and was wholly lost to the plaintiffs (below); and also thereby the residue of the said goods and merchandizes, being of great value, to wit, of the value of 10,000*l.* of like lawful money, became and was greatly damaged, lessened in value, and spoiled, and the plaintiffs (below) lost and were deprived of divers great gains and profits which might and would otherwise have arisen and accrued to them from the sale thereof, to wit, at *London* aforesaid.

The defendants below pleaded the general issue.

At the trial, before Lord Chief Justice *Tenterden*, at the Sittings in *London* after *Michaelmas* Term, 1826, the Jury returned a special verdict to the following effect:—

“ On the 11th *March*, 1817, the plaintiffs below shipped on board the ship *Benson*, near *Calcutta*, in the *East Indies*, 2171 bags of sugar, and 191 chests of indigo, then being in good order and well conditioned, for which the following bill of lading was signed by *George Betham*, then being the master of the said ship, under the circumstances hereinafter mentioned:—

“ ‘ Shipped, by the grace of God, in good order and well-conditioned, by Messrs. *Colvin, Bazett, & Co.*, in and upon the good ship called the *Benson*, whereof is master (under God) for this present voyage, *George Betham*, now riding at anchor in the river *Hooghly*, and by God’s grace bound for *London*, to say, 2171 bags of sugar, and 191 chests of indigo, being marked and numbered as in the margin; and are to be delivered, in the like good order and well-conditioned, at the aforesaid port of *London*, (the act of God, the King’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever, excepted), unto

Messrs. *Baxett, Farquhar, Crawford, & Co.*, or to their assigns; freight for the said goods being paid by bills.'

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" *George Betham* received the said goods on board the said ship in the river *Hooghly*, to be carried and conveyed according to the bill of lading. At the time of the said goods being so shipped and received, and the said bill of lading signed, and before that time, the defendants below were the owners of the said ship; and before the said ship sailed to the *East Indies*, and whilst they were such owners, the following charter-party, bearing date the 7th *June*, 1816, was executed by the defendant below, *Thomas Starling Benson*, who was then the managing owner of the ship, and acting on behalf of himself and the other owner of the ship, on the one part, and *George Betham*, of the other part, for the said ship *Benson*:—

" ' This charter-party of affreightment, made and concluded in *London*, the 7th *June*, 1816, between *Thomas Starling Benson*, of the city of *London*, part-owner of the good ship or vessel called the *Benson*, of 573 tons admeasurement, or thereabouts, now lying in the port of *London*, of the one part, and *George Betham*, of the city of *London*, merchant and mariner, freighter of the said ship, of the other part, witnesseth, that the said owner, for the consideration hereinafter mentioned, doth hereby promise and agree to and with *George Betham*, his executors, administrators, and assigns, that he, *George Betham*, shall have, and he is hereby appointed to the command of the said ship, but with such restrictions as hereinafter mentioned, and subject to the proviso and condition hereinafter contained respecting the appointment of an agent on board the said ship on the part of the said owners: and the said ship, being tight, staunch, and substantial, and every way properly fitted, victualled, and provided, as is usual for vessels in the merchants' service, and for the voyage

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and service hereinafter mentioned, and being also manned with thirty-five men and boys, the said commander included, the said *George Betham* shall be at liberty, and he is hereby allowed and permitted, to receive, take, and load on board the said ship in the port of *London* all such lawful goods, wares, and merchandize as he may think proper to ship, not exceeding in the whole what the ship can reasonably stow and carry over and above her stores, tackle, apparel, and provisions, and reserving sufficient room in the said ship for one hundred tons of goods to be laden by or for account of the said owner as hereinafter is mentioned: and, the said ship being so laden, the said *George Betham* shall and will set sail therewith, and proceed to *Calcutta*, in the *East Indies*, with liberty to touch at *Madeira* and *Madras* in her outward passage; and, being arrived at *Calcutta* aforesaid, shall and will unload the said outward cargo, and reload the said ship with a cargo of *East India* produce, and return with the same to the port of *London*, and, upon her arrival there, and being finally discharged of her cargo, and cleared by the revenue officers, the said intended voyage and service is to end and be completed; the act of God, the King's enemies, restraint of princes and rulers, fire, and all and every the dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever, excepted: and the said owner doth hereby further promise and agree to and with the said *George Betham*, his executors, administrators, and assigns, that, in case any of the aforesaid complement of thirty-five men and boys shall happen to die, or desert or leave the said ship during the said intended voyage and service, so that the number shall be reduced below thirty-two, that then, and in every such event happening, the aforesaid number of thirty-two shall, if practicable, be kept and made up at the expense of the said owner; and, further, that the said ship shall at all times during the said intended voyage and service, be furnished and provided with proper and sufficient stores, pro-

visions, and other necessary articles, and that the said ship shall, if required, be kept and continued in the service aforesaid for and during the term of twelve calendar months, to be accounted from the 12th day of the present month of *June*, and for and during such longer time or term as may be necessary to complete her aforesaid voyage, and until her return to the port of *London*, being finally discharged of her homeward cargo, and cleared by the revenue officers: and the said owner doth also promise and agree that the said ship shall, previous to her departure from the port of *London* on her above-mentioned voyage, be furnished and provided with water-casks capable of containing eighteen tons of water; and the said owner doth also engage to provide the said ship with coals and wood for cooking and dressing the passengers' provisions, for which the said freighter is to pay or allow unto the said owner at and after the rate of fourteen pence for every passenger or servant *per* lunar month, and so in proportion for a less period: in consideration whereof, and of every thing above mentioned, he the said *George Betham* doth hereby promise and agree to and with the said *Thomas Starling Benson*, in manner and form following, that is to say, that he the said *George Betham* shall and will take upon himself the command of the said ship for and during her said intended voyage, and until her return to the port of *London*, and shall and will navigate her to the best and utmost of his skill and ability; and also that he the said *George Betham* shall and will accept, receive, and take the said ship into his service for and during the term and space of twelve calendar months certain, to commence and be accounted from the 12th day of the present month of *June*, and for and during such longer time or term, if any, as may be necessary to complete the said voyage, and until her return to and final clearance in the port of *London*; and, further, that he shall and will well and truly pay or cause to be paid unto the said owner freight

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for the use and hire of the said ship at and after the rate of twenty-five shillings *per* ton, register measurement of the said ship, *per* calendar month, for and during the aforesaid term of twelve calendar months certain, and for and during such longer time or term, if any, as may be necessary to complete her said intended voyage, and until her return to the port of *London*, and being finally discharged of her homeward cargo, and cleared by the revenue officers, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following, that is to say, the sum of 1,000*l.*, part thereof, at or before the execution of these presents, the sum of 2,000*l.*, further part thereof, by approved bill or bills to be drawn in *London* upon *Calcutta*, in favour of the said owner, payable, as to one moiety thereof, at one calendar month, and as to the other moiety thereof, at two calendar months next after the ship shall arrive at *Calcutta*; and the residue and remainder of such freight to be paid, or secured to the satisfaction of the said owner, upon the arrival of the ship in the port of *London*, and previous to commencing the discharge of her homeward cargo: Provided always, that, in case the said ship shall be kept or detained at *Calcutta* aforesaid more than ninety days, then and in such case the said *George Betham* doth hereby engage to pay or cause to be paid, at *Calcutta* aforesaid, to the agent of the said owner the sum of 1,000*l.*, either in cash or by bills to be approved of by such agent, in part payment of the balance of freight which may become due under and by virtue of this charter-party; and the further sum of 1,000*l.* at the expiration of every sixty days after the said ninety days which the said ship may expend or lie at *Calcutta* aforesaid: And it is hereby declared and agreed by and between the said parties, that bills remitted from *India*, in manner hereinafter expressed, shall be deemed, taken, and considered as good and sufficient security for the payment of the residue or balance of freight which may become due under

and by virtue of these presents as hereinbefore mentioned: and the said *George Betham* doth hereby especially promise and agree, that all and every the bills of exchange which may be taken in payment of the freight of the said ship's homeward cargo, shall be made payable to or to the order of Messrs. *Buckles, Baxter, & Buchanan*, of the city of *London*, merchants, or be indorsed over to them, and delivered to the owners' agent, to be by him remitted to the said *Buckles, Baxter, & Buchanan*, in *London*, who, it is hereby especially agreed by and between the said parties, are to receive the amount thereof as joint-trustees for the said owner and the said *George Betham*; he the said *George Betham* authorizing and empowering them to appropriate the proceeds of such bills of exchange in or towards payment to the owner of the balance of freight which may be or become due to him under and by virtue of these presents, and the residue, if any, to the said *George Betham*: and the said *George Betham* doth hereby further promise and agree to furnish and provide, at his own expense, sufficient provisions and water, and also all other necessaries for the use of the passengers on board the said ship; and that he shall and will pay for all provisions belonging to the owners of the said ship which shall be issued for the use of, or consumed by, any of the passengers or servants during the voyage, an account of the same being rendered to him once a week by the said owner's agent, or by the steward on board the ship; and, further, that all expense of bulk-heads, cabins, and other accommodation for passengers shall be paid by him the said *George Betham*, the materials for which are to be left on board the said ship at the termination of the voyage, and to become the property of the owner: And the said *George Betham* doth also agree to pay and defray all port charges and pilotage which may be incurred by the ship during her intended voyage, save and except such as may be incurred in the port of *London*, outward and homeward bound, and

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once at *Calcutta*: And the said *George Betham* doth hereby further agree that the owner shall have the liberty of shipping on board the said ship outward bound, freight free, any quantity of iron, vinegar, and mustard he may think fit, not exceeding in the whole one hundred tons, to be delivered at *Calcutta*: Provided always, and it is hereby expressly agreed and understood by and between the parties to these presents, and particularly by the said *George Betham*, that an agent shall be put on board the said ship by the owner for and during the whole of her aforesaid voyage and service, and who is to have a separate cabin in the said ship for his sole use, and to mess at the said *George Betham's* table; which agent is to have the sole management, direction, and superintendence of the ship's stores and provisions, and the issuing and delivering out of the same for and during the intended voyage; and such agent is likewise to have the sole ordering and purchasing of any supplies, stores, provisions, and other articles which may be required for the use of the ship during her voyage; and that all bills which may be required to be drawn upon the owners of the ship for any such supplies, or otherwise on account of the ship, shall be drawn by such agent only: Provided also, and it is hereby further agreed by and between the said parties, and especially by the owner, that the freighter shall have the liberty and privilege of employing the ship in the *East Indies* for any intermediate voyage or voyages he may think fit, without prejudice to this charter-party, but not exceeding in the whole the time or term of twelve months, to be computed from and after the expiration of thirty days next after the arrival of the ship at *Calcutta* aforesaid, upon the said *George Betham* paying or causing to be paid to the owner the same rate of freight as is hereinbefore stipulated, *viz.* twenty-five shillings *per* ton *per* month, for all such additional time as the ship may be so employed or detained in *India*; such additional freight being paid

to the owner's agent for the time being, or secured to his satisfaction, previous to the ship entering or proceeding on such additional voyage or service: and it is hereby expressly provided and declared, that, in case the said *George Betham* shall proceed with the said ship to any port or place other than *Madeira, Madras, and Calcutta* aforesaid, without the special leave in writing of the agent of the owner for the time being, or, if the said *George Betham* shall be guilty of a breach of any or either of the promises and agreements herein contained on his part, then and in any such case he shall be and become divested of any further command of or in the said ship, and it shall thereupon be lawful for the owner's agent for the time being to appoint another commander for the said ship in lieu and instead of the said *George Betham*.'

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" This charter-party was made and executed *bonâ fide*.

" On the *25th July*, 1816, the following memorandum was signed and agreed to by the defendant *Thomas Starling Benson* and the said *George Betham*:—

" ' Conditions agreed between *Thomas Starling Benson*, Esq., owner, and *George Betham*, Esq., commander of the ship *Benson*, on a voyage to *India*.—Wages, say 10*l.* *per* month. No primage or privilege of tonnage whatever. Cabin allowance for voyage (it being understood that the agent, chief and second mates, and surgeon, if any, mess in cabin) 150*l.*, owner providing nothing. Allowance while in *India*, three sicca rupees *per* day.'

" *Samuel Oviatt* went as agent on board the said ship *Benson*, under the charter-party, on the said voyage, and carried out letters of introduction from the persons using the said firm of *Buckles, Baxter, & Buchanan*, being merchants in *London*, on behalf of the said defendants below to the plaintiffs below; by which he was directed to apply to

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them in case of necessity; and he did apply to them, and they acted as agents at *Calcutta*, both for the said defendants below and *George Betham*, as hereinafter mentioned. *Samuel Oviatt* acted under a power of attorney executed by the defendant below, *Thomas Starling Benson*, which recited the charter-party, and then gave *Samuel Oviatt* authority to do on his behalf all things for which that instrument contemplated the appointment of an agent. *Samuel Oviatt* carried out with him the charter-party, and communicated it to the plaintiffs below, as soon as he arrived at *Calcutta*, and before the shipping of the goods; and the plaintiffs below before that time read the charter-party and received a copy thereof; and for the freight of the said quantity of sugar and indigo in the bill of lading mentioned, the plaintiffs below drew bills upon certain other persons, payable, sixty days after the ship *Benson's* arrival in *London*, to the order of *Buckles, Baxter, & Buchanan*; which bills they delivered to *Samuel Oviatt*, to be remitted to the said last-mentioned persons, pursuant to the stipulations in the charter-party; and the said bills were so remitted. *George Betham* employed the plaintiffs below as his agents at *Calcutta*, who accordingly acted as his agents, and collected and paid over to him the freight of the goods carried in the said ship on the voyage from *London* to *Calcutta*, and procured freight for him on the voyage from *Calcutta* to *London*; and they had a commission from him for procuring such freight.

“ The ship sailed on her voyage from the river *Hooghly* to *London* with the said quantities of sugar and indigo on board, but they were never delivered to the plaintiffs below, or their assigns, pursuant to the bill of lading, although no act of God, the King's enemies, fire, or any other dangers or accidents of the seas, rivers, or navigation, of what nature or kind soever, prevented the same from being so delivered; but, on the contrary thereof, 1651 bags of the said sugar, and twelve chests of the

said indigo were wholly lost to the plaintiffs below, and the residue of the said sugar and indigo greatly lessened in value."

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Judgment having been given for the plaintiffs below in the Court of *King's Bench* (a), upon this special verdict, the defendants below brought a writ of error.

The case was now argued by Mr. *Campbell* for the plaintiffs in error, and Mr. *F. Pollock* for the defendants in error.

On the part of the plaintiffs in error, it was contended, that, inasmuch as, by the terms of the charter-party, the vessel was let to freight to the captain, the latter was the owner *pro hac vice*, and the party with whom the plaintiffs below contracted as carrier; and that the finding of the Jury, that the charter-party was entered into *bond fide*, and "that the charter-party was communicated to the plaintiffs below before the shipping of the goods, and that the plaintiffs below, before that time, read the charter-party, and received a copy thereof," negatived any inference that might otherwise arise, that *Betham*, by reason of his command of the vessel, was held out by the defendants below to the plaintiffs below as their agent in the conduct and management of the ship.

The following authorities were cited—*Abbott on Shipping* (b), *James v. Jones* (c), *Mackenzie v. Rowe* (d), *Vallejo v. Wheeler* (e), and *Soares v. Thornton* (f).

On the other side, it was contended, that, by the charter-party, the defendants below did not profess to part with

(a) See 8 Barn. & Cress. 166;
S. C. 2 Man. & Ryl. 47.

(b) Page 22.

(c) *Abbott on Shipping*, 20.

(d) 2 Camp. 482.

(e) Cowp. 143.

(f) 7 Taunt. 627.

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any interest in the vessel to *Betham*; that it was contrary to public policy that the same person that took the ship as freighter should himself be appointed captain by the owners; that the agent put on board by the defendants below was so put on board with powers inconsistent with *Betham's* temporary ownership of the vessel; and that the owners virtually received the benefit of the homeward freight, by the transmission of the freight bills to *England*.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

In this writ of error the sole question appears to be, whether, upon the legal construction of the charter-party set out at length in the special verdict, the defendants below were the owners of the vessel called the *Benson* at the time the contract for the carriage and conveyance of the goods in question was made; or whether, on the contrary, *Betham*, the captain and freighter of the vessel, became, *pro tempore*, the owner thereof: for, the present action, although in form an action upon a tort, is virtually and substantially an action upon the contract contained in the bills of lading, and set out in the declaration. To decide, therefore, whether the action is rightly brought, it must be ascertained with whom the contract was made, whether with the defendants below, as the owners of the vessel, through *Betham*, as their master or agent, or with *Betham* himself, as the freighter and owner *pro hac vice*, for his own benefit, and on his own behalf.

Now, the special verdict has found two things—first, that this charter-party was entered into *bonâ fide*; by which we understand that there was no secret or sinister design in framing this charter-party, to leave the ship-owners in the dominion of their ship and enjoyment of the profits, and at the same time to exempt them from respon-

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sibility to the shippers of goods; but that the real object of the owners and the freighter was such as is to be collected from the charter-party itself, and such only. The other fact found by the Jury is, "that the charter-party was communicated to the plaintiffs below before the shipping of the goods, and that the plaintiffs below before that time read the charter-party, and received a copy thereof;" which latter finding negatives any inference that would otherwise arise, that *Betham*, by reason of his command of the vessel, was held out by the defendants below to the plaintiffs below as their agent in the conduct and management of the ship, as they knew the real situation and relative rights of the captain and the owners before they put their goods on board to be carried on that voyage. The question to be considered, therefore, is simply that of the construction of the charter-party.

In the first place, by the terms of the charter-party, the owners covenant "that the ship shall, if required, be kept and continued in *the service* described therein during the term of twelve calendar months, and such longer time as may be necessary to complete the voyage." And *Betham*, on the other hand, covenants "to accept, receive, and take the ship into *his service* for the term of twelve calendar months certain, and until the voyage shall be ended, and to pay to the owner for the *use or hire* of the said ship at and after the rate of twenty-five shillings *per ton per month* during the said term of twelve calendar months certain, and until her return to the port of *London* and clearance, or up to the day of her being lost, captured, or last seen or heard of."

But it is objected by the plaintiffs below, that such contract contains no words of express demise: and undoubtedly it does not; but, even in a lease of lands no such words are absolutely necessary—"any words which amount to a grant are sufficient for a lease (*a*)."

(a) Co. Litt. 45. b.

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there are cases in the books, that, if a man covenants that *A.* shall have the land for a term, rendering rent, or that the covenantee shall enjoy the land (*a*), these words would amount to a lease. Now, the present case comes very near those referred to; for, the owners do covenant that the ship shall be kept in the *service* of *Betham* for a certain time; and *Betham* covenants that he will receive her into his service during that time, and that he will pay for *the use or hire* of her a certain freight: stipulations that appear equivalent in their effect to an actual demise of the ship.

But, further, the whole of the ship is so far parted with, that it is thought necessary that *Betham* should covenant with the owners that they should have liberty to load, on the outward voyage, iron and other articles, not exceeding in the whole one hundred tons. Again, the mode in which the ship was to be used, and in which the freight reserved by the charter-party is to be paid, support the same construction of the charter-party. The ship, both on her outward and homeward voyage, was to be put up by *Betham* (in many parts of the charter-party called *the freighter*) as a general carrying ship. The freight which the owners stipulate to receive from him is quite independent of that which he receives for the carriage of goods. Theirs is a time freight; his depends on the carriage of the goods shipped. If the ship went out without any cargo, or was lost before her arrival at her outward or homeward port of destination, in all which cases *Betham* might receive no freight, the owners would still receive the same amount as if she had returned full, or, in case of loss of the ship, up to the day of her loss. Under these circumstances, we think the captain, in putting up the ship as a general ship, and signing bills of lading, cannot be considered as acting as the servant or agent of the ship-owners, or in

(a) 1 Leonard, 136.

any other manner than as the temporary owner of the ship.

Three objections have been principally relied on in argument by the defendants in error—*first*, that the same person who took the ship as freighter was himself appointed as the captain by the owners of the ship—*secondly*, that an agent was put on board by the owners with powers inconsistent with *Betham's* ownership of the vessel *pro tempore*—*thirdly*, that the owners virtually received the benefit of the homeward freight, by the transmission of the freight bills to *England*.

With respect to the first objection, it is almost the invariable practice and usage, that the owners of a ship, although they let it out upon freight to a charterer, do themselves appoint the captain and crew; the chartering of the ship not being so much the chartering of the hull, as of the ship in a state fit for the purposes of mercantile adventure. There seems no reason, therefore, that the chartering of the ship in any particular case to the captain of that ship should create any more responsibility in the owner to the shippers of goods, where such fact is made known to them, than if the ship were freighted to an entire stranger.

The second objection is answered by reference to the charter-party, by which it appears that the authority of the agent was limited to the superintendence of the acts of *Betham* as captain, and not as freighter; the utmost authority given to the agent being that of displacing the master and appointing another, in case *Betham* should be guilty of a breach of any of the covenants or agreements on his part. But, if *Betham* ceased to be master, he did, nevertheless, by the terms of the charter-party, continue the freighter of the ship; possessing the same power to take goods on board, and liable to the same responsibilities, on the one hand, to the owners for the time freight for which he had contracted; on the other hand,

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to the shippers of goods, for the safe conveyance of the goods shipped.

As to the third objection, the charter-party gives the owners a *security* upon the freight bills received by the freighter, but gives the owners no direct or immediate interest in the freight earned, the whole of the surplus of which belongs to *Betham*. If *Betham* had obtained no homeward cargo from *Calcutta*, so that no freight bills could have been transmitted, the owners would still have been entitled to their time freight. The freight earned by *Betham* on the intermediate voyage, for twelve months, in *India*, does not become a security to the owners. Even in the homeward voyage, if the ship had been lost, there might have been no freight payable to the freighter, but still he must have made good his own liability to a monthly freight for the use and hire of the vessel.

Upon the whole, therefore, we think the effect of this charter-party was, to make the freighter the legal owner of this ship *pro tempore*; that the freight for the carriage of these goods was paid to him for his own use; and, consequently, that the defendants below are not liable to an action for the non-delivery of the goods. We think, therefore, that the judgment of the Court of *King's Bench* must be reversed.

Judgment reversed.

END OF MICHAELMAS TERM.

AN

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TO THE

PRINCIPAL MATTERS.

—♦—

ACCOUNT STATED.

1. The plaintiff demanded from the defendant 40*l.*, alleged to be due upon an agreement between them as outgoing and in-coming tenant. The defendant offered 17*l.*:—*Held*, not sufficient evidence to support a count upon an account stated. *Wayman v. Hillard*, 729

ACKNOWLEDGMENT.

See FINES AND RECOVERIES, 4.

ACTION ON THE CASE.

See SLANDER, 1.

1. Where the defendant recommended an agent to the plaintiffs, with a knowledge that his representation of the character of the agent was false:—*Held*, in an action on the case, to recover damages for the misconduct of the agent, that it was not necessary for the plaintiffs to prove a malicious or interested motive by the defendant for the misrepresentation:—If what the defendant said was false within his own knowledge, and occasioned an injury to the plaintiffs, it is

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a sufficient ground of action. *Foster v. Charles*, 61

2. The plaintiff claimed a right to pen back the water of a stream running through the defendant's land, for the purpose of irrigating a meadow. The original mode of enjoying this right had, for fifty years, been by placing loose stones, and occasionally a board, across the stream; but, on a late occasion, the plaintiff's tenant fastened down the board with stakes, and the defendant caused both the board and the stakes to be removed:—*Held*, that he could only justify the removal of the stakes; and the Jury having found a verdict for the plaintiff in an action on the case for an alleged injury to him by the removal of the board, the Court refused to grant a new trial. *Greenlade v. Halliday*, 71

3. In an action on the case for false representations made by the defendant to the plaintiffs, touching the character and circumstances of an agent or traveller he was desirous of recommending to them, and of the fraudulent concealment of facts within his knowledge, and which he ought to

have communicated to the plaintiffs, the Judge, in substance, told the Jury, that, if the defendant made the representations knowing them to be false, and injury resulted therefrom to the plaintiffs, he was guilty of fraud in the legal acceptance of the term, and answerable in damages, although he made the representations without any design to benefit himself thereby. The Jury returned a verdict for the plaintiffs, accompanying it with this statement:—"We consider that there was no fraudulent intention on the part of the defendant, though that which he has done legally constitutes a fraud." The Court held that the action lay, and refused to enter the verdict for the defendant on this finding. *Foster v. Charles*, 741

4. An action will lie for an excessive distress, and leaving a man in possession, although the goods of the tenant are not so completely removed from his control as to prevent him from carrying on his business. *Baylis v. Usher*, 790

AFFIDAVIT TO HOLD TO BAIL.

1. An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in a certain sum, upon the balance of a bill of exchange drawn by the plaintiff upon and accepted by the defendant, and due at a day past, is sufficient. *Walmesley v. Dibdin*, 10

2. In an affidavit of debt, the defendant was described as *Thomas Frogatt Dibdin*; his real name was *Thomas Frognall Dibdin*. In the declaration, the defendant was described as *Thomas Frognall Dibdin*, sued by the name of *Thomas Frogatt Dibdin*; and he signed the bail-bond in his proper name:—*Held* to be a waiver of the misnomer in the affidavit. *Ibid.*

AGREEMENT.

AGREEMENT.

See ASSUMPSIT.

EVIDENCE, 4.

PRACTICE, 33.

1. The defendant drew upon his brother, *C. L. H.*, certain bills of exchange, and indorsed them to the plaintiffs as security for advances made and to be made by them to *C. L. H.* As a further security, *C. L. H.*, by a deed to which the plaintiffs and defendant respectively were parties, assigned to one *B.* the lease of his house, and the fixtures, furniture, and effects therein, in trust that, at the request of the plaintiffs, *B.* should sell the same, and apply the proceeds in discharge of debts due or thereafter to become due to the plaintiffs. The deed also contained a proviso that the premises should be sold or offered for sale, and the proceeds, if sold, applied in the manner specified in the deed, before any proceedings should be commenced against the defendant upon the bills. The trustee (with the knowledge of the defendant) never took possession, but *C. L. H.* remained on the premises. The goods of *C. L. H.* were afterwards sold by the assignees appointed under a commission sued out against him:—*Held*, that, under the circumstances, the proviso was no bar to the plaintiffs' right of action upon the bills. *Lancaster v. Harrison*, 561

2. The plaintiffs being entitled to certain stock, which had been transferred in the books of the Bank of England under a forged power of attorney, entered into an engagement with the Bank to tender a proof of the value of the stock, as a debt upon the estate of the firm of which the person who committed the forgery was a member, in consideration of the Bank agreeing to replace the stock, and to pay the intermediate dividends:—*Held*, that, by this agreement,

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the plaintiffs' right of action against the Bank was suspended, until they took the proceeding which they had bound themselves by such agreement to adopt. *Stracey v. The Bank of England*, 639

ALLOTMENT.

See INCLOSURE ACT.

AMENDMENT.

See PRACTICE, 12.

ANNUITY.

1. The statute 8 & 9 *Wm.* 3, c. 11, does not apply to a warrant of attorney given as a security for the payment of an annuity; and therefore, the grantee may sign judgment and sue out execution for the arrears of the annuity, without previously assigning breaches under the 8th section of that statute. *Shaw v. The Marquis of Worcester*, 21

2. An annuity was granted for four lives, with a covenant on the part of the grantor to insure the fourth life, to the amount paid for the consideration, within thirty days after the decease of the three first:—The Court refused to set aside the securities for usury. *In re Nash*, 793

ARBITRATION.

See AWARD.

ARREST.

See PRACTICE, 4, 10, 38.

ASSIGNEES.

See BANKRUPT.

INSOLVENT DEBTOR.

ASSUMPSIT.

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ASSUMPSIT.

See SHERIFF, 2.

1. The defendants, directors of a Mining Company in *South America*, agreed to employ the plaintiff as superintendent of the mines, for three years, at a salary increasing yearly; and the directors were at liberty to dissolve the agreement at any time, on giving the plaintiff twelve months' notice, or paying him twelve months' salary in lieu of such notice, and a reasonable sum towards defraying his expenses to *England*; and if the plaintiff served the three years, he should be entitled to the expenses attending the return of himself and his family. The directors dismissed him before the expiration of the second year, without giving him the notice, or paying him the year's salary:—*Held*, that he was only entitled to a year's salary from the date of his dismissal, and to his own expenses for his return to *England*; and the Jury having found for those sums only, the Court refused to increase the verdict, by adding expenses incurred by the plaintiff for the return of his family, or for the salary which would have accrued from the time of his dismissal to the end of the third year, when his service would have ended. *French v. Brooke*, 11

2. The plaintiff, an occupier of lands, having been sued by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit; upon which the defendant undertook to indemnify him from all costs of the suit, if he would suffer the defendant to defend in his, the plaintiff's, name. The vicar having succeeded in the suit, the plaintiff's attorney paid him the costs incurred before as well as after the defendant's promise of indemnity:—*Held*, that there was a sufficient consideration for the defendant's promise

to indemnify the plaintiff from all the costs of the suit. *Adams v. Dansey*, 245

ATTACHMENT.

See PRACTICE, 6, 36, 52.

ATTACHMENT OF PRIVILEGE.

See PRACTICE, 18.

ATTORNEY.

1. In an action against an attorney for negligence in the prosecution of a former action brought by the plaintiff against two other attorneys (partners) for negligence in conducting the defence of the plaintiff in an action which had been previously brought against him, and in which the declaration alleged, that, in consequence of the negligence of those attorneys, judgment by default had been signed against the plaintiff, and such further proceedings had, that final judgment was afterwards signed, and execution issued against him; and the defendant in that action only produced the Prothonotaries' book, in which all judgments by default were entered, in proof of that allegation, and the plaintiff was nonsuited; upon which he commenced an action against the defendant for not having procured proper evidence of that judgment:—*Held*, that, as it was not a direct allegation of a judgment on record, with a plea [distinctly putting it in issue, the not producing the record of the judgment was not such a want of skill or diligence, or gross negligence, by the defendant, as to make him answerable to the plaintiff. *Godefroy v. Dalton*, 149

2. The plaintiff may compromise an action with the defendant without

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consulting his attorney; and, if the latter afterwards proceed in the action, in order to secure his costs, he is bound to make out a clear case of collusion between the plaintiff and defendant to deprive him of such costs. *Nelson v. Wilson*, 385

3. An attorney suing out process in a cause in which he himself is plaintiff, need not indorse thereon his name and place of abode. *Hamilton v. Jones*, 523

4. To entitle an attorney to privilege from arrest, he must shew that he is actually practising at the time; a solitary instance of employment at an election will not suffice. *Anonymous*, 810

5. A bill of costs for business done under a commission of bankruptcy need not be delivered, signed by the attorney, a month before action brought thereon. *Hamilton v. Jones*, 868

AWARD.

1. Where a verdict was taken for the plaintiff at *Nisi Prius*, subject to an award, and after the arbitrator had heard the evidence for both parties, but before the order of reference was made a rule of Court, the plaintiff revoked the authority of the arbitrator, by deed, and proceeded in the action—the Court refused to stay the proceedings. *Green v. Pole*, 193

2. By a Judge's order, the defendant was required, within a limited time, to deliver to the plaintiff particulars of set-off, and, in default thereof, the defendant was to be precluded from giving evidence in support of his set-off at the trial. The defendant neglected to comply with the terms of the order, and the cause was afterwards referred by an order of *Nisi Prius*; and after the arbitrator had proceeded with the reference, a Judge, during the Assizes, made an order for the delivery of the particulars of the

defendant's set-off:—*Held*, that he had no authority so to do under the statute 1 *Geo.* 4, c. 55, s. 5, as, after the order of reference, the cause was out of Court. *Ashworth v. Heathcote*, 396

3. The plaintiff chartered a ship to the defendants. The charter-party contained a stipulation that the ship should proceed to *New Zealand*, and that, when arrived, the master should give notice of the fact to the defendants' agent there, and wait fourteen days for a return cargo; but that, if the agent of the defendants should give notice of his determination not to load the ship with a return cargo at *New Zealand*, the voyage should be at an end, and the defendants should pay a dead freight of 500*l.* The ship accordingly proceeded to *New Zealand*, and the master, after waiting the necessary time, and finding no agent of the defendants there, went round to *Batavia*, and there obtained for the ship a much more valuable freight than she would have earned under the charter-party, after taking into consideration the increased expenses and the delay of the circuitous voyage. An action was brought by the owner to recover from the freighters the 500*l.* dead freight. The cause was referred; and the arbitrator, taking into account the larger freight earned by the ship on the homeward voyage, directed the verdict to be entered for one shilling damages, for the general breach of contract:—The Court refused to set aside the award. *Stanforth v. Lyall*, 829

BAIL.

See PRACTICE, 38.

1. The defendant, on being arrested, gave bail to the Sheriff for his appearance; but, before the return of the writ, or putting in and perfecting

the bail above, he was convicted of felony, and remained in criminal custody until the opinion of the twelve Judges upon a point reserved should be ascertained. The Court, upon payment of costs by the bail below, and putting the plaintiff in the same situation as if bail above had been put in in due time, allowed four days for putting in and perfecting special bail, although the time for so doing had expired when an application was made by the bail below to enlarge the time for perfecting special bail, or rendering the defendant in their discharge. *Joyce v. Pratt*, 55

2. Bail above having justified, they consented to a *cognovit* being given upon such terms as might be agreed on between the plaintiff and the defendant (their principal). Default was made at the time the debt and costs were to be paid by the terms of the *cognovit*, and a negotiation afterwards took place between the parties, but was of no avail. The plaintiff sued out writs of *scire facias* against the bail, and signed judgment thereon, without giving them notice that the negotiation was at an end, or that the *cognovit* remained unsatisfied:—The Court ordered the writs and subsequent proceedings to be set aside. *Charleton v. Morris*, 114

3. The Court ordered a rule for the allowance of bail to be discharged (no cause being shewn to the contrary), the bail having, on their justification, perjured themselves as to the amount of their property. But the Court refused to order the defendant to be detained in custody in another suit, as it was not shewn that he was privy to the perjury of the bail, and the only remedy against them is by indictment. *Barling v. Waters*, 128

4. Where special bail have been put in, but have omitted to justify, the Sheriff may put in fresh bail and render the defendant, even after an at-

tachment has issued against him for not obeying a rule to bring in the body. *Hamilton v. Jones*, 454

5. The plaintiff's attorney left two writs of *sci. fa.* at the Sheriff's office, and directed that they should be returned *nihil*, at the same time expressing apprehension lest the proceedings should come to the knowledge of the bail:—The Court, at the instance of the bail, ordered the proceedings to be set aside. *Wilson v. Biden*, 537

6. In the case of bail by affidavit, where time had been allowed to answer affidavits impeaching their sufficiency, the Court refused to allow the defendant in the mean time to justify fresh bail. *Ling's Bail*, 576

7. *Holy Thursday* is not a juridical day, and therefore not to be reckoned as one of the four clear days for a *sci. fa.* against bail to lie in the office. *Scott v. Larkins*, 748

BAIL-BOND.

See PRACTICE, 16.

BAIL IN ERROR.

1. The Court discharged with costs a rule for setting aside an execution issued after the allowance of a writ of error, and the justification of bail in error—the writ of error being obtained for the mere purpose of delay, and the bail being men of straw. *Fuller v. Coombe*, 792

BANKRUPT.

See AGREEMENT, 1.

1. Two of three partners, bankers, ordered the doors and windows of the bank to be closed, and a placard was posted on the door, announcing that they had suspended payment:—*Held*, that this was a beginning to keep house within the third section of the statute 6 Geo. 4, c. 16, and an act of bank-

ruptcy, although neither of the partners lived in the banking-house. *Cumming v. Baily*, 36

2. One of three partners, bankers, left this house at *Bath*, and went to *London*, to raise funds; and, having failed in his efforts to do so, he remained there three days:—*Held*, that the Jury were warranted in finding that he absented himself with an intent to delay his creditors. *Ibid.*

3. A bill of exchange is a chattel, and within the third section of the statute 6 Geo. 4, c. 16; and a fraudulent delivery or transfer of such bill by a trader to a creditor constitutes an act of bankruptcy. *Ibid.*

4. The plaintiff, an uncertificated bankrupt, in order to try the validity of the commission issued against him, arrested his assignees, upon an affidavit that they were indebted to him for money had and received to his use. The assignees having given bail to the Sheriff, the Court ordered the bail-bonds to be delivered up to be cancelled, on their entering a common appearance. *Chambers v. Bernasconi*, 218

5. The question, when a trader ceases to trade, is purely for the consideration of the Jury. *Dance v. Wyatt*, 201

6. An insolvent debtor, in his petition to the Insolvent Court, having stated that he had been declared a bankrupt:—*Held*, that the provisional assignee might institute proceedings to try the validity of the commission. *Ibid.*

7. The plaintiff, assignee of a bankrupt, having died, and another assignee having been appointed in his stead, the rule to enter a suggestion of such death on the record, in pursuance of the statute 6 Geo. 4, c. 16, s. 67, is absolute in the first instance. *Westall v. Sturges*, 217

8. An execution sued out upon a final judgment, after a judgment by

nil dicit, falls within the proviso of the 108th section of the statute 6 Geo. 4, c. 16, which comprises *all* judgments by default, and cannot be restrained to judgments by default by the consent or collusion of the parties; and the words "*obtained* by default, confession, or *nil dicit*," apply to a judgment obtained *before*, as well as after the passing of the act. *Cuming v. Welsford*, 238

9. An act of bankruptcy by lying in prison twenty-one days, under the statute 6 Geo. 4, c. 16, s. 5, does not relate to the first day of the imprisonment, as such act is not complete until the twenty-one days have elapsed. *Moser v. Newman*, 333

10. A commission of bankrupt was sued out against a trader, in 1822, when a deposition was made before the commissioners, proving the act of bankruptcy. The deponent died shortly afterwards, and no proceedings were taken under the commission until 1827. The deposition was not enrolled until March, 1828, when it was inrolled in the mode prescribed by the 5 Geo. 2, c. 30, s. 41, and also under the 95th section of the statute 6 Geo. 4, c. 16:—*Held*, that the deposition was not admissible in evidence, the statute 5 Geo. 2, having been repealed by the statute 6 Geo. 4; and that the 92nd section of that statute, which makes depositions conclusive evidence of the matters therein contained, is prospective, and applies only to commissions to be sued out after the passing of that act. *Key v. Goodwin*, 341

11. Where the defendant obtained his certificate as a bankrupt, after issue joined, and before trial, but did not plead it *puis darrein continuance*, and the plaintiff proceeded to trial and obtained judgment—the Court refused to order an *exoneretur* to be entered on the bail piece, although the plaintiff's attorney knew, before the

trial, that the defendant had got his certificate;—because the bail were still in a condition to render the defendant. *Humphreys v. Knight*, 370

12. But *held*, that he was entitled to be discharged on a summary application to the Court under the 6 Geo. 4, c. 16, s. 121. *S. C.* 375

13. A coach proprietor, after committing an act of bankruptcy, which was unknown to the defendant, requested him to accept a bill of exchange for 98*l.*, at three months' date, for his, the bankrupt's, accommodation. The defendant accepted the bill, which the bankrupt immediately indorsed, and gave to a creditor in payment for corn. After this transaction, but on the same day, the bankrupt agreed to sell the defendant four horses for 70*l.* as part of the amount of the acceptance. But, to accommodate the bankrupt, the defendant allowed him to run the horses in his coach for nearly six weeks; at the expiration of which period they were delivered to the defendant, who paid the bill when it became due. The Jury found that the sale of the horses was *bonâ fide*, and returned a verdict for the defendant:—*Held*, however, that the transaction was not protected by the 82nd section of the 6 Geo. 4, c. 16, as it only amounted to a set-off of the price of the horses against a by-gone debt, and was not a payment by the bankrupt within the meaning of the act; and the Court directed a new trial. *Carter v. Breton*, 424

14. A general plea of bankruptcy under the 6 Geo. 4, c. 16, s. 126, must pursue the words of the statute, and conclude to the country. *Sheen v. Garrett*, 525

15. A ship-broker is subject to the bankrupt laws, falling within the description in the 2nd section of the 6 Geo. 4, c. 16—"bankers, *brokers*, and persons using the trade or profession of a scrivener, receiving other

men's moneys or estates into their trust or custody." *Pott v. Turner*, 551

16. A purchaser is not bound to take a doubtful title. Therefore, where the vendors derived title under an assignment made by a party for the benefit of his creditors, in itself an act of bankruptcy:—*Held*, that they could not compel the purchaser to accept the title, without proof that there was no creditor in a situation to sue out a commission against the assignor.

Ibid.

17. The husband of one of two co-heiresses became bankrupt after an abatement:—*Held*, that his right to bring a writ of entry passed to his assignees by the bargain and sale under the commission. *Mitchell v. Hughes*, 577

18. One of two partners, after an act of bankruptcy by him alone, paid to the agent of a creditor a debt due from the firm, the agent having notice of such act of bankruptcy:—*Held*, that this was not a payment protected by the 82nd section of the 6 Geo. 4, c. 16; the moiety of the partnership property belonging to the bankrupt partner being by the act of bankruptcy vested in his assignees; and, as to the moiety of the solvent partner, the payment being made without authority, as the bankruptcy destroyed the implied agency resulting from the partnership. *Craven v. Edmondson*, 622

19. The assignees of a bankrupt are not bound by a sale under a former superseded commission; but may recover back the property, although the purchase were strictly *bona fide*. *Gould v. Shoyer*, 635

20. A bankrupt cannot be called as a witness either to support or to defeat the commission, or even to explain a doubtful act, which might or might not be an act of bankruptcy. *Sayer v. Garnett*, 734

21. A trader, in a state of insol-

vency, and concealing himself from his general creditors, after a secret act of bankruptcy, in part payment of a debt, delivered a bill of exchange to a creditor who was acquainted with his place of retreat, and with whom he was in friendly communication:—*Held*, that this was not a payment protected by the 82nd section of the statute 6 Geo. 4, c. 16. *Bagnall v. Andrews*, 839

BARON AND FEME.

See PRACTICE, 1.

BILL OF EXCEPTIONS.

See PRACTICE, 24.

BILLS OF EXCHANGE.

See AGREEMENT, 1.

1. A bill of exchange is a chattel, and within the third section of the statute 6 Geo. 4, c. 16; and a fraudulent delivery or transfer of such bill by a trader to a creditor, constitutes an act of bankruptcy. *Cumming v. Bailly*, 86

2. In an action by the drawer against the acceptor of a bill of exchange, the latter obtained a rule to stay proceedings, on payment of debt and costs, and the delivery of the bill to him:—*Held*, that the rule was complied with, by the delivery of the bill by the plaintiff, although he had obliterated his name and cancelled the date; for, if the defendant had sustained an injury by the erasures, he had his remedy by action. *Tomlin v. Lawrence*, 54

3. Although the 2nd section of the statute 1 & 2 Geo. 4, c. 78, requires an acceptance of an inland bill of exchange to be in writing upon the bill, yet the drawer, in an action against the acceptor, need not aver in his declaration that the acceptance was in writing. *Chalie v. Belshaw*, 275

4. The defendant drew a bill of exchange upon one *T.*, for the accommodation of one *R.*, who was considerably indebted to the plaintiff, and who procured *T.*'s acceptance:—*Held*, that the drawer was entitled to notice of the dishonour of the bill, notwithstanding the acceptor had no assets of his in his hands, and had informed him, prior to the bill becoming due, that he would not provide for it—he having a reasonable expectation that it would be provided for by *R.*, and having a remedy over against him in case he was called upon to pay it. *Lafitte v. Slatter*, 457

5. One *W.* drew a bill upon the defendant, to whom he was in the habit of consigning goods for sale. The bill was accepted, but neither party at the time knew the state of the account between them. It afterwards appeared that the balance of the account was considerably in favour of the defendant when he accepted the bill:—*Held*, that, notwithstanding, it was not an accommodation bill. *Bagnall v. Andrews*, 839

BOND.

See INTEREST.

1. The plaintiff declared in debt on a bond conditioned for payment of 1000*l.* The defendant in his plea set out a deed poll, which, after reciting that the plaintiff would become entitled, on the decease of the defendant, to 750*l.*, in right of the plaintiff's wife, by virtue of a deed of settlement on her marriage, and that the defendant had given a bond to the plaintiff for 1000*l.* (the bond declared on), the plaintiff and his wife released the sum of 750*l.*, and the plaintiff covenanted that he would not require payment of the 1000*l.* secured by the bond, nor claim interest for the same during the life of the defendant; and that, in case the bond should be assigned by the plaintiff, and the de-

fendant should be required by the assignee to pay the principal, the plaintiff would pay the defendant interest for the same during the defendant's life:—*Held*, that the deed poll did not operate as a defeasance of the bond, and, consequently, that it was no answer to an action by the assignee in the name of the obligee. *Morley v. Frear*, 305

BROKER.

1. A ship-broker is subject to the bankrupt laws, falling within the description in the 2nd section of the 6 Geo. 4, c. 16—"bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody." *Pott v. Turner*, 551

2. The plaintiff, a broker, being employed by the defendant to obtain freight for a vessel, entered into an agreement for a charter-party with one *E.* The defendant refused to ratify the contract:—*Held*, that the plaintiff was not entitled to commission. *Broad v. Thomas*, 732

CAPIAS AD RESPONDENDUM.

See PRACTICE, 12, 13, 42, 53.

CAPIAS AN SATISFACIENDUM.

See PRACTICE, 10, 19, 41, 51.

CARRIER.

1. The law implies a duty in the owner of a vessel, whether a general ship, or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course. *Davis v. Garrett*, 540

2. The defendant received on board his barge certain lime to be conveyed for the plaintiff from *Bewly Cliff* to *London*. The master deviated from

the usual and customary course of the voyage, without any justifiable cause, and, whilst the barge was out of her course, she encountered a storm, and the sea communicating with the lime caused it to ignite, whereby the barge and cargo were lost:—*Held*, that the damage sustained by the plaintiff was sufficiently proximate to the wrongful act of the defendant, to form the subject of an action. *Davis v. Garrett*, 540

3. The plaintiff, who was about to proceed from *S.* to *London*, by the defendants' coach, received from one *G.*, at a village near *S.*, a parcel containing a 50*l.* bank-note, with instructions to book it at the defendants' office at *S.* The plaintiff neglected to book the parcel at *S.*, but placed it in a carpet-bag containing wearing apparel. The bag and its contents were lost. In an action against the defendants for negligence, the Jury having returned a verdict for the plaintiff for the value of the wearing-apparel only—The Court refused to increase the verdict by the amount of the note. *Miles v. Cattle*, 630

CERTIFICATE.

See PRACTICE, 27.

CHARTER-PARTY.

See AWARD, 3.

1. The defendants below (ship-owners) chartered a ship to one *B.*, on a voyage to *Calcutta* and back, stipulating (among other things), that *B.* should have the command of the vessel; and that the crew and all the ship's stores should be provided by the owners—*B.* paying a freight of 25*s.* per ton, per month, part to be paid in cash on executing the charter-party, other part by bills on *Calcutta*, and the balance to be secured by the transmission of the bills taken for the homeward freight to certain persons in *London*, in trust to pay thereout such

balance as might be due to the owners, and to pay the residue to *B.* And it was further provided, that an agent should be put on board by the owners, who should have the sole management and superintendence of the ship's stores and provisions; and that, if *B.* should be guilty of any breach of the charter-party, it should be lawful for such agent to appoint another commander. The plaintiffs below (with knowledge of the above charter-party) shipped goods on board the vessel in the *East Indies* for *London*. These goods were never delivered pursuant to the bills of lading:—*Held*, that *B.* alone was responsible to the shippers for such non-delivery, he being owner of the vessel *pro hac vice*. *Newberry v. Colvin*, 876

COGNOVIT.

See COSTS, 1.

PRACTICE, 5.

COMMISSION.

See BROKER, 2.

COMMON.

See INCLOSURE-ACT.

TRESPASS.

CONDITION.

See LEASE, 2.

CONDITIONAL PROMISE.

See STATUTE OF LIMITATIONS, 1, 3, 5.

COPYHOLD.

See DEVISE, 1, 2.

COSTS.

1. *J. S.* having given a *cognovit* for a certain sum, with a stay of execution, afterwards mortgaged certain premises as a security for the payment of that sum, and it was provided, that, in case of default of payment, it

should be lawful for the mortgagee to issue execution on the judgment, and to levy the costs of the judgment, *and all other costs and charges whatsoever attending the same*. The mortgagee having levied, his right to the goods seized under the writ was disputed in an action brought against him by the assignees of the mortgagor, who had become bankrupt; and they having obtained a verdict, a new trial was granted on the application of the mortgagee, in which he succeeded, on the ground, that the mortgagor was not a trader within the bankrupt laws:—*Held*, that the mortgagee could not claim the costs of the first trial from the mortgagor, as costs or charges attending the judgment under the *cognovit*. *Doe. d. Holt v. Roe*, 177

2. The mortgagor, on the levy being made, gave the Sheriff notice that the goods seized belonged to him jointly with another person, upon which the Sheriff impaneled a Jury to determine to whom the property belonged:—*Held*, that the mortgagee was entitled to claim of the mortgagor the costs of the inquisition, if the mortgagee had paid them to the Sheriff, and the Court referred it to the Prothonotary to ascertain that fact. *Ibid*.

3. In an action of debt on a bail bond against three defendants jointly, one of them pleaded his bankruptcy and certificate in bar, upon which the plaintiff entered a *nolle prosequi* as to him, and filed a replication as to the two others. The plaintiffs had notice that one of the defendants had become bankrupt before plea pleaded:—*Held*, that, notwithstanding, the latter was not entitled to his costs under the statute 8 *Eliz.* c. 2, s. 2. *Booth v. Middlecoat*, 182

4. The plaintiffs having arrested the defendant, and held him to bail for 1123*l.* and consented at the trial to take a verdict for 710*l.*, they hav-

ing, at the time of the arrest, a sum of 407*l.* belonging to the defendant in their hands:—*Held*, that he was entitled to his costs under the statute 43 *Geo.* 3, c. 46, s. 3, as the balance was the sum ultimately due to the plaintiffs, after deducting the latter sum, although the account on which the balance was due was a joint account between the defendant and a third person. *Forster v. Weston*, 276

5. The statute 8 & 9 *Wm.* 3, c. 11, s. 1, does not extend to an action on the case for a malicious prosecution; although the plaintiff allege in his declaration, that the defendant maliciously caused him to be apprehended by virtue of a magistrate's warrant, and to be *falsely imprisoned*, and detained in prison for a long time. Therefore, where one of four several defendants was acquitted, and a verdict was entered for him accordingly:—*Held*, that he was not entitled to his costs under the above statute. *Murray v. Nicholls*, 280

6. In a joint action of *assumpsit* against three defendants, two of them pleaded together, and the third by another attorney. The two former only appeared at the trial, and a verdict having been found for the defendants generally, judgment was signed and costs taxed by these two, and paid by the plaintiffs. The Court, on the motion of the third defendant, refused to direct the Prothonotary to review the taxation, and allow his costs. *Smith v. Campbell*, 469

7. A defendant having been arrested a second time for a sum which had been demanded in a former action, wherein he had before been held to special bail, and the plaintiff had obtained a verdict for a *part* of his demand, *and costs*.—The Court ordered the defendant to be discharged on filing common bail. *Hamilton v. Jones*, 868

8. A bill of costs for business done under a commission of bankruptcy

need not be delivered signed by the attorney a month before action brought thereon. *Hamilton v. Jones*, 868

COUNTY COURT.

1. The plaintiff having signed interlocutory judgment in a county court for want of a plea, and given the defendant notice of executing a writ of inquiry, the defendant, on the day previously to its execution, sued out a writ of *pone* to remove the cause in this Court:—*Held* to be regular, as the cause might be removed at any time before the Sheriff's Jury were sworn; and the Court refused to award a *procedendo*. *Godley v. Marsden*, 138

COVENANT.

See LEASE, 1.

1. Tenant for life, remainder over, by indenture demised to the lessee, his executors, &c., for the term of fifteen years, without any express covenant for quiet enjoyment. The lessee was evicted by the remainderman, after the death of the tenant for life, but before the expiration of the fifteen years:—*Held*, that the lessee could not maintain an action of covenant against the executor of the tenant for life in respect of such eviction. *Adams v. Gibney*, 491

DEAD FREIGHT.

See AWARD, 3.

DEBT.

See PRACTICE, 16, 26.

DECEIT.

See ACTION ON THE CASE, 1, 3.

DEED.

See AGREEMENT, 1.

DEMURRER.

See PLEADING, 6, 7, 8.

DEVISE.

1. Devise to two trustees and the survivor of them, or the executors or administrators of such, of all the testator's freehold messuages, and also all his stock or shares in the funds, and all money in hand and debts due to him, and all shares or property whereof he might be possessed or entitled to, upon trust for testator's wife and children; the freehold to be sold, and an equal division to be made among the children and their heirs, after the death of the wife, and all the children had attained the age of twenty-one. The testator afterwards made a codicil, by which he directed his copyhold estate to be transferred to his wife until the expiration of the leases, and, after that time, as soon as convenient, or within one year, to be sold for the benefit of the children and their heirs, as directed in the will:—*Held, first*, that the copyhold estate did not pass to the trustees by the will or codicil; and *secondly*, that the interest of the wife in such estate determined on the expiration of the leases. *Chapman v. Prickett*, 404

2. A testator, after directing that his debts should be paid, and giving various pecuniary legacies to his children, gave and bequeathed to his widow "the whole of his remaining property, in the Bank of *England* or otherwise, and also a freehold house in *St. B.*; also a freehold estate in *St. A.* (with other freehold lands enumerated); also a copyhold estate of the manor of *E. B.*; also a leasehold estate in *St. A.*, with all right and title to the same:—*Held*, that the widow took an estate in fee-simple in the freehold, and a customary fee in the copyhold estate. *Sharp v. Sharp*, 445

3. Testator devised all his real and personal estate "unto the *heir-at-law* of Mrs. R., of B., in the county of P.;" and, in case such heir-at-law should die without issue, then "to the next heir-at-law of the said Mrs. R., and his or her issue." Mrs. R., of B., was living at the time of the death of the testator:—*Held*, that the eldest son of Mrs. R. took an estate tail in the real estates devised by the said will, as heir-at-law. *Carne v. Rock*, 862

DISTRESS.

See ACTION ON THE CASE, 4.

EJECTMENT.

See EVIDENCE, 4.
PRACTICE, 17.

1. Service of a copy of a declaration and notice in ejectment on a woman upon the premises, who represented herself to be the wife of the tenant in possession:—*Held* sufficient. *Doe d. Walker v. Roe*, 11

2. A notice to a weekly tenant, whose tenancy commenced on a *Wednesday*, to quit on *Friday*, provided his tenancy commenced on a *Friday*, or, otherwise, at the end of his tenancy, next after one week from the date of the notice:—*Held* sufficient. *Doe d. Campbell v. Scott*, 20

3. In shewing cause against a rule nisi in ejectment, under the statute 1 Geo. 4, c. 87, calling on the tenant to undertake, in case a verdict should pass for the plaintiff, to give him judgment of the term next preceding the time of trial, and to enter into a recognizance for the costs, an affidavit of the tenant was produced, which stated, that, on the 28th *September*, he received a notice to quit on the 25th *March* following, and that the plaintiff's steward had afterwards agreed, by parol, to re-let him the premises, and that he had held them under such parol agreement:—

Held, first, that the notice to quit, being for a customary half year, was sufficient; and secondly, that the affidavit by the tenant was not sufficiently precise, as he should have stated for what period, or on what terms, he retook the premises under the parol agreement. *Roe d. Durant v. Doe*, 391

4. The Court will not permit a mortgagee to come in and defend as landlord in an action of ejectment, under the statute 11 Geo. 2, c. 19, s. 13, unless he shews that the application is made at his instance and request, and that he is *bonâ fide* interested in the result of the suit. *Doe d. Pearson v. Roe*, 437

5. In ejectment, where the tenant has been admitted to defend, and has entered into the recognizance to pay damages and costs, in pursuance of the statute 1 Geo. 4, c. 87, s. 1, in intitling such recognizance, the name of the tenant should be inserted in place of that of the original nominal defendant. *Roe d. Durant v. Doe*, 531

6. In ejectment, where the defendant has given the undertaking to give the plaintiff judgment of the term preceding the trial, in case he shall obtain a verdict, and has also entered into the recognizance, with two sureties, to pay costs and damages, both which are required by the 1 Geo. 4, c. 87, s. 1, he cannot afterwards sue out a writ of error upon the judgment, so as to operate a stay of proceedings, without entering into a further recognizance *with two sureties*, with condition pursuant to the provisions of the 16 & 17 Car. 2, c. 8, s. 3. *Roe d. Durant v. Moore*, 761

EMBLEMENTS.

1. A lease of lands contained a condition, "that, if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared a bankrupt, or if

he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *feri facias*, or any other writ of execution, should issue, it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, re-possess, and enjoy, as in his former estate." The tenant gave a warrant of attorney, upon which judgment was entered up, and his goods taken in execution and sold, and a commission of bankrupt afterwards issued against him. The lessor entered for the forfeiture:—*Held*, that he was entitled to the emblements. *Davis v. Eyton*, 820

ENTRY, WRIT OF.

See WRIT OF ENTRY.

ERROR, WRIT OF.

See EJECTMENT, 6.

EXECUTION.

See PRACTICE, 5, 10, 19, 30, 41, 45, 51.

EVICTION.

See COVENANT.

EVIDENCE.

See ATTORNEY, 2.

1. If a person who is called as a witness may receive an immediate benefit or injury by the determination of the cause in which he is called, his testimony is not admissible:—therefore, a remainder-man in tail is not a competent witness for a prior tenant in tail, in ejectment brought by the latter to try the validity of a recovery suffered by a former tenant in tail. *Doe d. Lord Teynham v. Tyler*, 29

2. Proof that the plaintiff had been made the subject of laughter at a

public meeting, is admissible, as identifying him with the subject of the libel, and as a proof of the consequences which had necessarily resulted to him from its publication. *Cook v. Ward*, 99

3. An examined copy of an affidavit filed by the proprietor of a newspaper at the stamp-office, did not correspond in terms with the title of the paper when produced in evidence, but the sub-distributor of stamps produced the paper in which the alleged libel was published, and said that he believed that the defendant was the proprietor, and that he had accounted and paid duties on advertisements inserted therein:—*Held*, that it was sufficient evidence to go to a Jury, of a publication by the defendant. *Ibid*.

4. In ejectment, one of the plaintiff's witnesses stated, on cross-examination, that he had prepared an agreement or lease in writing, between the plaintiff and A. T., relative to the premises sought to be recovered, and that he had heard the latter say, that he held the premises under the plaintiff, but not that he held under the agreement:—*Held*, that nevertheless the plaintiff was bound to produce the agreement, as its existence was shewn by one of his own witnesses. *Fenn d. Thomas v. Griffiths*, 299

5. A commission of bankrupt was sued out against a trader, in 1822, when a deposition was made before the commissioners, proving the act of bankruptcy. The deponent died shortly afterwards, and no proceedings were taken under the commission until 1827. The deposition was not enrolled until March, 1828, when it was inrolled in the mode prescribed by the 5 Geo. 2, c. 30, s. 41, and also under the 95th section of the statute 6 Geo. 4, c. 16:—*Held*, that the deposition was not admissible in evidence, the statute 5 Geo. 2 having

been repealed by the statute 6 *Geo.* 4, c.16; and that the 92nd section of that statute, which makes depositions conclusive evidence of the matters therein contained, is prospective, and applies only to commissions to be sued out after the passing of that act. *Key v. Goodwin*, 341

6. *Quære*, whether a paper containing entries of accounts by a deceased steward, who debited himself with sums received on the one side, and discharged himself by disbursements on the other, and at the end was an entry in his handwriting, stating that he had paid the balance to his employer, is admissible in evidence? *Doe d. Lord Teynham v. Tyler*, 377

7. Where a witness remains in Court after an order has been made requiring all witnesses to retire, it is in the discretion of the Judge at *Nisi Prius* to admit or reject his testimony, according to circumstances. *Parker v. M'William*, 480

8. A bankrupt cannot be called as a witness either to support or to defeat the commission, or even to explain a doubtful act, which might or might not be an act of bankruptcy. *Sayer v. Garnett*, 734

9. To take a case out of the statute of limitations, the plaintiff offered to prove by oral testimony a written promise, conformable to the 9 *Geo.* 4, c. 14, the document itself being lost:—*Held*, that such secondary evidence was admissible. *Haydon v. Williams*, 811

EXCESSIVE DISTRESS.

See ACTION ON THE CASE, 4.

EXONERETUR.

See PRACTICE, 27.

FALSE REPRESENTATION.

See ACTION ON THE CASE, 1, 3.

FIERI FACIAS.

See PRACTICE, 30.

FINES AND RECOVERIES.

1. By rule of Court, *Mich.* 39 *Geo.* 3, all captions of fines in *Scotland* must be taken before advocates and clerks to the signet. But where the property was of small value, and the deforciant (ten in number) lived at a great distance from *Edinburgh*, and the *dedimus* was directed to four commissioners, one of whom was a magistrate and a notary public, the Court permitted the fine to pass. *Hack*, plaintiff; *M'Gregor* and others, deforciant, 9

2. The Court permitted a recovery to pass, although the warrants of attorney of four vouches were on two separate pieces of parchment. *Sawbridge*, demandant; *Jeyes*, tenant; *Parsons* and others, vouches, 119

3. The Court refused to allow a fine to be perfected, where, through the negligence of the clerk of the attorney to whom it had been entrusted, the papers had been mislaid before the fine had reached the *Chirographer's* office. *Hooper*, plaintiff; *Green*, deforciant, 521

4. The acknowledgment of a warrant of attorney for suffering a recovery in *Wales* may be taken by an attorney of the Court of Great Sessions, although the tenant to the *præcipe* do not reside within the principality. *Davies*, demandant; *Dawkins*, tenant; *Evans*, vouches, 789

FIXTURES.

See LANDLORD AND TENANT, 2.

FORFEITURE.

See LEASE, 2.

GUARDIAN.

1. Where an infant sues by guardian, who is sworn to be in insolvent circumstances, the Court will require him to give security for costs. *Mann v. Berthen*, 215

HEIR-AT-LAW.

See DEVISE.

HOLY THURSDAY.

See PRACTICE, 50.

HUSBAND AND WIFE.

See PRACTICE, 1.

INCLOSURE ACT.

1. In replevin for seizing cattle alleged to be *damage feasant*, the plaintiff pleaded a right of common over the *locus in quo*, awarded him by the commissioners under an act for inclosing the waste lands of G., by which the award of the commissioners was declared to be final unless appealed from by an action upon a feigned issue to be brought at the next or the following Assizes:—*Held, first*, that, after the expiration of the time limited for disputing the award, the original right of common of the plaintiff could not be called in question—*secondly*, that the corporation of G., who were mentioned in the act as lords of the manor, and received under it an allotment in lieu of their manorial rights, were bound by the act. *Phillips v. Maile*, 770

INFANT.

1. Where an infant sues by guar-

dian, who is sworn to be in insolvent circumstances, the Court will require him to give security for costs. *Mann v. Berthen*, 215

INSOLVENT DEBTOR.

See LANDLORD AND TENANT, 3.

1. A warrant of attorney executed by a trader to one of his creditors, authorized him to enter up judgment and sue out execution forthwith, and he did so four days after the instrument was executed, and the Jury found that, when it was given, the defendant meant to take the benefit of the Insolvent Debtors' Act:—*Held*, to be a charge upon, or assignment of the estate and effects of the insolvent, within the 32nd section of the statute 7 Geo. 4, c. 57, and void as against the assignees of the insolvent. *Sharpe v. Thomas*, 87

2. The assignment of an insolvent's estate and effects to the provisional assignee gives him a right to sue, and the 16th section of the statute 7 Geo. 4, c. 57, which enacts, that it shall be lawful for such assignee to sue in his own name, *if the Court shall so order*, is only affirmative of his right, and it is not necessary that he should previously obtain the order of the Court for that purpose. *Dance v. Wyatt*, 201

3. An insolvent debtor, in his petition to the Insolvent Court, having stated that he had been declared a bankrupt:—*Held*, that the provisional assignee might institute proceedings to try the validity of the commission. *Ibid.*

4. The plaintiff, being in prison for debt, assigned all his effects to the provisional assignee, and was afterwards discharged under the Insolvent Debtors' Act. During the time of his imprisonment, the defendants, as agents of his landlord, broke

open the outer door of his house, no one being within, and distrained his furniture for rent in arrear. The plaintiff, when he went to prison, left his wife in possession of the house, but she had left it on a visit three days before the distress was made:—

Held, that the interest in the house being vested in the provisional assignee by the assignment, the plaintiff had not a property in the goods, or a constructive possession, so as to maintain trespass against the defendants for breaking into his house, unless he shewed that his wife had continued in possession with the assent of the assignee. *Topham v. Dent*, 264

5. The defendant, a prisoner in a county gaol, was brought up under the Lords' Act before a Judge at the Assizes, who, after examining the note for the payment of his allowance, and the affidavit verifying the plaintiff's signature to the note, ordered the defendant to be remanded. The Court held, that the decision of the Judge was final as to the remanding the defendant, and that they had no power to interfere or direct him to be discharged, unless the party at whose suit he was in custody had not complied with the terms of the note, after the defendant had been so ordered to be remanded. *Briggs v. Sharpe*, 269

6. A prisoner charged in execution for a debt under 300*l.*, and afterwards for another debt of 500*l.*, may still be brought up under the compulsory clauses of the Lords' Act, at the suit of the execution-creditor. *Womersley v. Bousfield*, 538

7. A prisoner brought up under the compulsory clauses of the Lords' Act, in *Trinity* Term, and remanded, was ordered to be brought up again in the following term, notwithstanding that more than the sixty days allowed by the statute would then have elapsed. *S. C.* 539

N N N 2

INSPECTION OF PAPERS.

1. A rated parishioner having sued the churchwardens in trespass for turning him out of a vestry room:—*Held*, that he had a right to inspect and take extracts from the parish books, without paying any costs to the person producing them. *Newell v. Simpkin*, 894

2. The plaintiff in his declaration alleged, that the defendant had agreed to take him, the plaintiff, into his, the defendant's, service for a year, and, at the expiration of that period, to take him into partnership. Pleas, *first*, the general issue; *secondly*, that there was no agreement or memorandum in writing, as required by the statute of frauds. Replication, that there was an agreement in writing; on which issue was joined:—*Held*, that the defendant was entitled to inspect the agreement, although it was sworn that it consisted only of a letter written by the defendant's agent. *Blogg v. Kent*, 433

3. The defendants were sued as directors of an incorporated company, for mismanagement of the company's affairs. The Court refused to allow them to inspect the books kept by the company during the period of their directorship, the affidavit of the motion not stating such inspection to be material or necessary to their defence to the action. *Imperial Gas Company v. Clarke*, 727

INTEREST.

1. Interest is only allowed by law upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade (as in the case of bills of exchange, &c.) or other circumstances. *Foster v. Weston*, 589

2. *A.*, *B.*, and *C.*, by an instrument under seal, engaged to pay to the

plaintiffs 1500*l.*, in goods, in equal payments, at three, five, and seven months; in failure of which they thereby rendered themselves liable "to be sued and proceeded against for the amount."—*Held*, that this contract did not entitle the plaintiffs to interest upon the amount from the respective days of payment. *Foster v. Weston*, 589

INTERESTED WITNESS.

See EVIDENCE, 1, 6, 8.

JOINT-STOCK COMPANY.

1. Certain persons met for the purpose of forming a joint-stock company. Directors were appointed, and advertisements and a prospectus were issued, describing the company as having a capital of 600,000*l.*, divided into 12000 shares of 50*l.* each, and stating that the concerns of the company were to be regulated by a deed of settlement and an act of Parliament; and that all persons who did not execute the deed within thirty days after it was ready, were to forfeit all share and interest in the concern. No act of Parliament was ever applied for. About 7500 shares, in all, were allotted. One third of the shareholders only paid the first deposit on their shares; one sixth paid the second; and only sixty-five signed the deed (amongst whom was one of the defendants). A book containing the names of the shareholders (those of the defendants among the rest), was prepared by the secretary, and shewn by him to the plaintiffs, as an inducement to them to trust the company; but it did not appear that this was done with the knowledge or assent of the defendants. A further advertisement was afterwards issued by the directors, declaring the shares of those who had neglected to pay the instalments to be forfeited:—*Held*, that

the mere circumstance of applying for shares, and paying the deposit thereon, did not constitute the defendants partners in the concern, they not having signed the deed, or done any other act to identify themselves with the company; and that the fact of their names appearing (without their knowledge or assent) in the book shewn to the plaintiffs was not a holding of themselves out to the world as partners, so as to render them liable for the debts of the company. *Fox v. Clifton*, 676

2. The defendants were appointed directors of a joint-stock company for supplying the town of *Brighton* with water, attended meetings of the directors, and accepted and paid the first instalment upon the number of shares required to qualify them to act as directors. The resolutions entered into at the first formation of the company, and the prospectus subsequently issued, stated that an act of Parliament would be applied for to regulate and establish the company. After the defendants had ceased to attend meetings of the company, the directors advertised for tenders for the excavation of reservoirs, and employed the plaintiff to do the necessary works:—*Held*, that the defendants (they having once accepted the office of directors, and not having since done any act to divest themselves of the responsibility attached to that character) were liable to the plaintiff for the work done by him, although they were not actually parties to the contract, and although no act of Parliament for incorporating the company had been obtained. *Doubleday v. Muskett*, 750

LANDLORD AND TENANT.

1. A notice to a weekly tenant, whose tenancy commenced on a *Wed-*

nesday, to quit on *Friday*, provided his tenancy commenced on a *Friday*, or otherwise at the end of his tenancy next after one week from the date of the notice:—*Held* sufficient. *Doe d. Campbell v. Scott*, 20

2. A pump erected by a tenant, and so fixed as to be removable without injury to the freehold, may be taken away by him at the expiration of his term, as being an article of domestic use or convenience. *Grymes v. Bow-eren*, 143

3. The statute 8 *Anne*, c. 14, s. 1, which entitles a landlord to a year's rent on an execution sued out against his tenant, applies only to cases where the judgment creditor claims adversely to the landlord, and not where the execution is sued out at the instance of the landlord himself. Therefore, where a creditor signed judgment on a warrant of attorney, and levied under a *fi. fa.* for the amount, after the tenant had become insolvent and surrendered himself to prison, where he remained until he was discharged by the Insolvent Debtors' Court:—*Held*, that the landlord could not retain a year's rent which was paid over to him by the Sheriff's officer from the proceeds of the sale, and that the assignees of the insolvent were entitled to recover it back in an action for money had and received. *Taylor v. Lanyon*, 316

4. A notice served on the 28th *September*, requiring the tenant to quit on the 25th *March* following, is sufficient—it being a customary half year. *Roe d. Durant v. Doe*, 391

5. The plaintiff being desirous of taking apartments of one *B.*, but not willing to do so unless the defendant, the superior landlord, would relieve him from the risk of having his goods distrained for *B.*'s rent, the defendant engaged, that, as long as the plaintiff paid *B.* his rent, he (the defendant) would never trouble the plaintiff or

his property. The plaintiff accordingly entered, but failed in the due payment of his rent:—*Held*, that the landlord's right of distress was not taken away, notwithstanding that the plaintiff had, before the distress made, tendered to *B.* the balance of rent due to him. *Welsh v. Rose*, 484

LEASE.

See COVENANT.

1. *A.*, by indenture of lease—reciting that the lessees had, by and with the permission of the lessor, and of *W. S.* and *C. F. F.* (the owners of the other two third parts of the demised premises), taken down a smelting-mill belonging to them, situate upon part of the waste of certain manors, and that the lessees *did engage to erect*, at their own expense, a *smelting-mill* of larger dimensions upon another part of the waste, which mill, &c., it had been agreed should be the property of the lessor, *W. S.*, and *C. F. F.*, in lieu of the said mill, &c., so taken down—demised to the defendant and five others an undivided third part of and in all and singular the mines, &c., then opened or discovered, or which during the continuance of the demise might be discovered under the said waste; and also all smelting-mills, &c., situate upon the said waste: with liberty to the lessees to sink shafts, and also to erect or build upon any part of the waste all such smelting-mills and other buildings as might be requisite or necessary for working the mines, and washing, dressing, &c., the ore and minerals raised therefrom: and the defendant covenanted with the lessor, his heirs and assigns, *that the lessees should keep the smelting-mill engaged to be erected by them*, and all other the buildings already erected, and which should during the continuance of the demise be erected near to the said

mill, and all watercourses, &c., in good and sufficient repair, and yield up the same in good repair at the expiration of the term:—*Held, first*, that, upon this deed, an implied covenant arose on the part of the defendant to erect the smelting-mill, so as to enable *A.*, the lessor, to sue for a breach thereof—*Secondly*, that such covenant ran with the land, inasmuch as it affected the mode of enjoying the demised premises; and therefore that an action of covenant might be maintained for the breach by an assignee of the reversion. *Easterby v. Sampson*, 601

2. A lease of lands contained a condition, "that, if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared a bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fiery facias*, or any other writ of execution, should issue, it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, repossess, and enjoy, as in his former estate." The tenant gave a warrant of attorney, upon which judgment was entered up, and his goods taken in execution and sold, and a commission of bankrupt afterwards issued against him. The lessor entered for the forfeiture:—*Held*, that he was entitled to emblements. *Davis v. Eyton*, 820

LIBEL.

See PLEADING, 7.

1. It is a libel to publish a ludicrous story of an individual in a newspaper, if it tend to render him the subject of public ridicule, although he had previously told the story of himself, *Cook v. Ward*, 99

2. An examined copy of an affidavit filed by the proprietor of a newspaper at the stamp-office, did not correspond in terms with the title of the paper, when produced in evidence; but the sub-distributor of stamps produced the paper in which the alleged libel was published, and said that he believed that the defendant was the proprietor, and that he had accounted for and paid duties on advertisements inserted therein:—*Held*, that it was sufficient evidence to go to a Jury of a publication by the defendant. *Ibid.*

3. Proof that the plaintiff had been made the subject of laughter at a public meeting, is admissible, as identifying him with the subject of a libel, and as a proof of the consequences which had necessarily resulted to him from its publication. *Ibid.*

4. A declaration for a libel, after an inducement that one *W. C.* had been tried and convicted of murder, and was about to be hanged for such crime, alleged that the defendant published the libel of and concerning the plaintiff, without averring that it was published of the plaintiff, and of and concerning the matters stated in the inducement:—*Held*, nevertheless, to be sufficient. *Ibid.*

5. In an action for a libel, the plaintiff, in the inducement to his declaration, alleged, that he had been appointed the surveyor, agent, and steward of a certain company or society of persons called the *New England Company*; and that, in such capacity, he had been and was employed by the said company: It was then averred, that the defendant published the libel of the plaintiff, and of and concerning his said business and employment by the company:—*Held*, that, as the inducement in the declaration contained distinct allegations that the plaintiff had been appointed the surveyor, &c., &c., of the com-

pany, and that in such capacity he had been employed by them, and that the defendant published the libel of and concerning the plaintiff and his employment by the company, without reference to his appointment, it was not necessary for him to prove any actual appointment to his office, either by deed, or otherwise. *Rutherford v. Erans*, 163

6. The defendant addressed a letter to the treasurer of a public company, in which he stated, that "the plaintiff was the most artful scoundrel that ever existed, and that he was in every person's debt, and that his ruin could not be long delayed;" but the writer added, "that he had never disclosed the affair, nor ever would, except to the person to whom the letter was addressed, and a friend:"—*Held*, that the omission of the latter part of the letter, in the declaration, did not constitute a ground of variance, as the charge imputed by the letter remained the same as that which was contained in the part set out in the declaration. *Ibid*.

7. The plaintiffs having obtained a contract for the supply of a quantity of *African* timber to the Navy Board, agreed to divide it with the defendant's house, the latter undertaking to supply the plaintiffs with their moiety of the timber at a certain price, and to take their bills for the amount. This agreement was subsequently abandoned by the defendant, on some difficulty arising as to the measurement of the timber; and the defendant wrote to Messrs. *W. & C.*, of *Sierra Leone* (who were correspondents and debtors to his firm), a letter strongly reflecting upon the character of the plaintiffs, stating them to be "notorious for every thing but fair dealing and a strict adherence to their engagements." In an action of libel, it was left to the Jury to say, whether the letter was written fairly and

honestly, or with a malicious intention to injure the plaintiffs. The Jury having found for the defendants—the Court directed a new trial:—*Held* also, that the transmission of the letter by the defendant to Messrs *W. & C.*, was sufficient evidence of publication by him. *Ward v. Smith*, 595

LIMITATION OF ACTION.

UNDER LOCAL ACT.

1. The *Brighton* paving and improvement act, 6 *Geo.* 4, c. clxxix, s. 255, enacts, that actions against persons proceeding under the act shall be brought within six calendar months next after the matter or thing done. The treasurer, surveyor, and contractors under the act, dug a sewer near the plaintiff's house, in consequence of which the foundation was sunk, and the walls were cracked:—*Held*, that the plaintiff's right of action was limited to six months from the day the cracks were occasioned. *Lloyd v. Wigney*, 222

LIQUIDATED DAMAGES.

See AWARD, 3.

LORDS' ACT.

See INSOLVENT DEBTOR, 5, 6, 7.

MEMORANDA, 621, 721, 722.

NEW TRIAL.

See LIBEL, 7.

PRACTICE, 23, 29, 47.

NOLLE PROSEQUI.

See PRACTICE, 16.

NONSUIT.

See PRACTICE, 8, 14, 47.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 1.

1. A notice served on the 28th September, requiring the tenant to quit on the 25th March following, is sufficient—it being for a customary half year. *Roe d. Durant v. Doe*, 391

PARTNERS.

See BANKRUPT, 1, 2, 18.

JOINT-STOCK COMPANY.

1. After a partnership has been dissolved, one of two partners has no power to bind the other, in an action brought against both jointly, by giving a *cognovit* to pay the debt and costs as between attorney and client. *Rathbone v. Drakeford*, 57

PAWNBROKER.

See USURY, 2.

PAYMENT.

1. The plaintiff, an occupier of lands, having been sued by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit; upon which the defendant undertook to indemnify him from all costs of the suit, if he would suffer the defendant to defend in his (the plaintiff's) name. The vicar having succeeded in the suit, the plaintiff's attorney paid him the costs incurred before as well as after the defendant's promise of indemnity. The plaintiff afterwards gave his attorney a promissory note for the amount of the costs so paid, but which was not at maturity when he sued the defendant on his promise:

—*Held*, that the payment of such costs by the plaintiff's attorney was equivalent to a payment by the plaintiff himself, as the attorney might be considered as his agent, for the purpose of making such payment. *Adams v. Dansey*, 245

PLEADING.

See LIBEL, 5, 6.

1. In trover for bank-notes, sovereigns, and a watch-seal, the defendant entered an appearance, and filed a plea as follows:—And the said defendant, by *J. G. W.*, who has been duly appointed solicitor on behalf of his Majesty, under the directions of the commissioners of his Majesty's Customs, and who acts as such solicitor under such directions in this behalf, comes and defends the wrong and injury when, &c. The plaintiff treated this plea as a nullity, and signed judgment. The Court set the judgment aside, on the ground, that the plea sufficiently disclosed that the person defending as attorney was acting in matters concerning the revenue, and within the statutory exemption of the 9 Geo. 4, c. 25. *West v. Taunton*, 79

2. A declaration for a libel, after an inducement that one *W. C.* had been tried and convicted of murder, and was about to be hanged for such crime, alleged that the defendant published the libel of and concerning the plaintiff, without averring that it was published of the plaintiff and of and concerning the matters stated in the inducement:—*Held*, nevertheless, to be sufficient. *Cook v. Ward*, 99

3. In *quare impedit*, a count alleged an immemorial right in the plaintiffs, as owners of messuages and lands within a chapelry (which lands were charged with the payment of yearly sums for the repair of the chapel), to nominate a curate and pre-

sent him to the bishop; and it was proved that part of the repairs of the chapel were defrayed out of the poor-rates:—*Held*, to be a variance, and that the evidence did not support the allegation. *Shepherd v. The Bishop of Chester*, 130

4. *Quære*, whether there can be more than one count in a *quare impledit*? *Ibid.*

5. The plaintiff declared, that the defendant, intending to prejudice him in the way of his business as a fruit-broker, falsely represented to *J. P.*, that the plaintiff had circulated a report in a sale-room where oranges of *J. P.* were selling, that *he the plaintiff* then had three or four vessels laden with oranges, between *Gravesend* and *London*; by reason of which, *J. P.* discontinued to deal with the plaintiff.—Proof, that the defendant represented the plaintiff to have said, that *there were* three or four vessels laden with oranges between *Gravesend* and *London*:—*Held*, a fatal variance. *Wood v. Adam*, 208

6. The plaintiff declared in debt on a bond conditioned for the payment of 1000*l.* The defendant, in his plea, set out a deed poll, which, after reciting that the plaintiff would become entitled, on the decease of the defendant, to 750*l.*, in right of the plaintiff's wife, by virtue of a deed of settlement on her marriage, and that the defendant had given a bond to the plaintiff for 1000*l.* (the bond declared on), the plaintiff and his wife released the sum of 750*l.*, and the plaintiff covenanted that he would not require payment of the 1000*l.* secured by the bond, nor claim interest for the same during the life of the defendant; and that, in case the bond should be assigned by the plaintiff, and the defendant should be required by the assignee to pay the principal, the plaintiff would pay the defendant interest for the same dur-

ing the defendant's life:—*Held*, that the deed poll did not operate as a defeasance of the bond, and, consequently, that it was no answer to an action by the assignee in the name of the obligee. *Morley v. Frear*, 305

7. In an action for a libel, the plaintiff alleged in his declaration, that the defendant had published of him in his profession or business of a proctor, that he had been suspended three times, once by Lord *S.*, and twice by Sir *J. N.* The defendant, as to the publishing so much of the libel as charged the plaintiff with having been once suspended in his profession and business of a proctor, pleaded, by way of justification, that he had been suspended by Sir *J. N.*, wherefore the defendant published that the plaintiff had been once suspended in his profession of a proctor:—*Held*, that, as the charge was severable, the plea was good on demurrer, and an answer to that part of the charge. *Clarkson v. Lawson*, 356

8. A general plea of bankruptcy under the 6 *Geo. 4*, c. 16, s. 126, must pursue the words of the statute, and conclude to the country. *Sheen v. Garrett*, 525

9. The defendant received on board his barge certain lime to be conveyed for the plaintiff from *Bewly Cliff* to *London*. The master deviated from the usual and customary course of the voyage, without any justifiable cause, and, whilst the barge was so out of her course, she encountered a storm, and the sea communicating with the lime caused it to ignite, whereby the barge and cargo were lost. In an action on the case for the loss of the lime, the declaration alleged that "it was the duty of the defendant to have carried and conveyed the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unneces-

sary deviation or departure from, or delay or hindrance in the same," and averred the loss to be "by reason of the deviation and departure, and delay and detention out of such usual and customary course and passage:—*Held*, that the declaration was sufficient to support a judgment for the plaintiff. *Davis v. Garrett*, 540

10. *Quære*, whether a conditional promise relied on to revive a debt barred by the statute of limitations, should not be declared on as such? *Haydon v. Williams*, 811

11. A count for slander, after an inducement that one *J. P.* had become a bankrupt, and that the plaintiff was about to prove a debt justly due to him by *J. P.* under a commission theretofore awarded against him, charged the defendant with saying, in a certain discourse had with the plaintiff of and concerning the matters in the introductory part of the count mentioned, and of and concerning him in his trade of a livery-stable keeper—"You (meaning the plaintiff) are a regular prover under bankruptcy (meaning that the plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy):"—*Held*, that, the innuendo being larger than the natural meaning of the words, the count was ill, for want of an averment that it had been the practice of the defendant, by the words complained of, to impute the proof of fictitious debts under commissions of bankruptcy. *Alexander v. Angle*, 870

PONE.

See PRACTICE, 15.

PRACTICE.

1. Service of a copy of a declaration and notice in ejectment on a woman upon the premises, who represented herself to be the wife of

the tenant in possession:—*Held*, sufficient. *Doe d. Walker v. Roe*, 11

2. The statute 8 & 9 *Wm.* 3, c. 11, does not apply to a warrant of attorney given as a security for the payment of an annuity, and therefore the grantee may sign judgment and sue out execution for the arrears of the annuity, without previously assigning breaches under the 8th section of that statute. *Shaw v. The Marquis of Worcester*, 21

3. In an action by the drawer against the acceptor of a bill of exchange, the latter obtained a rule to stay proceedings on payment of debt and costs, and the delivery of the bill to him:—*Held*, that the rule was complied with, by the delivery of the bill by the plaintiff, although he had obliterated his name, and cancelled the date; for, if the defendant had sustained an injury by the erasures, he had his remedy by action. *Tomlins v. Lawrence*, 54

4. The defendant, on being arrested, gave bail to the Sheriff for his appearance; but, before the return of the writ, or putting in and perfecting bail above, he was convicted of felony, and remained in criminal custody, until the opinion of the twelve Judges, upon a point reserved, should be ascertained. The Court, upon payment of costs by the bail below, and putting the plaintiff in the same situation as if bail above had been put in in due time, allowed four days for putting in and perfecting special bail, although the time for so doing had expired when an application was made by the bail below, to enlarge the time for perfecting the bail, or rendering the defendant in their discharge. *Joyce v. Pratt*, 55

5. A *cognovit* to pay debt and costs as between attorney and client, having been given by one of two partners (after the partnership had been dissolved), in an action brought against

both jointly, without the knowledge or assent of the co-defendant, the Court set aside a judgment and execution which had been entered up and sued out thereon. *Rathbone v. Drakeford*, 57

6. To render a person liable to an attachment for not attending upon a *subpoena*, it is incumbent on the party applying to state that he was a material and necessary witness for him:—*Quære*, whether it be necessary to produce the original writ of *subpoena* at the time of service of the copy. *Taylor v. Willans*, 59

7. In trover for bank-notes, sovereigns, and a watch-seal, the defendant entered an appearance and filed a plea as follows:—And the said defendant, by *J. G. W.*, who has been duly appointed solicitor on behalf of his Majesty, under the directions of the commissioners of his Majesty's customs, and who acts as such solicitor under such directions in this behalf, comes and defends the wrong and injury when &c. The plaintiff treated this plea as a nullity, and signed judgment. The Court set the judgment aside, on the ground that the plea sufficiently disclosed that the person defending as attorney was acting in matters concerning the revenue, and within the statutory exemption of 9 *Geo.* 4, c. 25. *West v. Taunton*, 79

8. The statute 17 *Car.* 2, c. 8, which enacts, that, in all personal actions, the death of either party between the verdict and the judgment shall not be alleged for error, does not apply to a case of nonsuit. *Farrance v. Nill*, 113

9. Bail above having justified, they consented to a *cognovit* being given upon such terms as might be agreed on between the plaintiff and the defendant (their principal). Default was made at the time the debt and costs were to be paid by the terms of the

cognovit, and a negotiation afterwards took place between the parties, but was of no avail. The plaintiff sued out writs of *scire facias* against the bail, and signed judgment thereon, without giving them notice that the negotiation was at an end, or that the *cognovit* remained unsatisfied:—The Court ordered the writs and subsequent proceedings to be set aside. *Charleton v. Morris*, 114

10. The defendants arrested the plaintiff on a *ca. sa.*, as the bail of one *E. M.*, for whom he had never become bail. After the plaintiff had been in custody nearly a month, he was discharged by an order of a Judge. The defendants had previously discovered their mistake, and promised to liberate the plaintiff, but did not do so. He afterwards brought trespass against the defendants, for false imprisonment, and they pleaded the general issue; and that the plaintiff had, together with another person, acknowledged a recognizance of bail, upon which the *ca. sa.* had issued, and that the recognizance still remained on the file of the Court of *King's Bench*. This Court refused to strike out the plea, or rescind the order to plead several matters, although it was objected that the plaintiff could not safely reply. *M^cCrandle v. Barwise*, 120

11. The Court ordered a rule for the allowance of bail to be discharged (no cause being shewn to the contrary), the bail having, on their justification, perjured themselves as to the amount of their property. But the Court refused to order the defendant to be detained in custody in another suit, as it was not shewn that he was privy to the perjury of the bail, and the only remedy against them is by indictment. *Barling v. Waters*, 125

12. A bailable *capias* having been made returnable on a day certain, in-

stead of a general return day, the defendant having given a bail-bond, the Court would not allow the writ to be amended, as it would prejudice the bail. *Houlden v. Fasson*, 126

13. Where a writ of *capias* was made returnable on the 3rd of *November*, being a day certain, instead of the general return day, viz. on the morrow of *All Souls*, and the defendant had given a bail-bond, the Court ordered the writ to be quashed. *S. C.* 127

14. Where two issues were found for the plaintiffs, and two for the defendants, and the Jury were discharged as to the fifth, and the verdict was entered accordingly, but leave was given to the defendants to move to enter a nonsuit:—*Held*, that the Court might direct the nonsuit to be entered, although the defendants had a verdict on some of the issues. *Shepherd v. The Bishop of Chester*, 130

15. The plaintiff having signed interlocutory judgment in a county court for want of a plea, and given the defendant notice of executing a writ of inquiry, the defendant, on the day previously to its execution, sued out a writ of *pone* to remove the cause into this Court:—*Held*, to be regular, as the cause might be removed at any time before the Sheriff's Jury were sworn; and the Court refused to award a *procedendo*. *Godley v. Marsden*, 138

16. In an action of debt on a bail-bond against three defendants jointly, one of them pleaded his bankruptcy and certificate in bar, upon which the plaintiff entered a *nolle prosequi* as to him, and filed a replication as to the two others. The plaintiffs had notice that one of the defendants had become bankrupt before plea pleaded:—*Held*, that, notwithstanding, the latter was not entitled to his costs under the statute 8 *Eliz.* c. 2, s. 2. *Booth v. Middlecoat*, 182

17. The lessors of the plaintiff hav-

ing brought three actions of ejectment in the Court of *King's Bench*, for the recovery of the same property, that Court ordered the proceedings in two of them to be stayed, upon certain terms, which were assented to by the counsel for all parties, and a rule was drawn up accordingly. The lessors of the plaintiff afterwards commenced an action of ejectment in this Court upon a later demise; but, as they sought to recover the same property, the Court ordered the proceedings to be stayed. *Doe d. Carthew v. Brenton*, 186

18. A writ of attachment of privilege having been made returnable on *Wednesday* next after fifteen days of *St. Hilary*, which happened to be the morrow of the *Purification*:—*Held* to be irregular; and the Court set aside the writ on motion. *Adcock v. Felton*, 195

19. The Court will not take judicial notice of an entry of a writ of *capias ad satisfaciendum* in the Sheriff's book. *Russell v. Dickson*, 196

20. Where a verdict was taken for the plaintiff at *Nisi Prius*, subject to an award, and after the arbitrator had heard the evidence for both parties, but before the order of reference was made a rule of Court, the plaintiff revoked the authority of the arbitrator, by deed, and proceeded in the action—the Court refused to stay the proceedings. *Green v. Pole*, 198

21. Where an infant sues by guardian, who is sworn to be in insolvent circumstances, the Court will require him to give security for costs. *Mann v. Berthen*, 215

22. The plaintiff, assignee of a bankrupt, having died, and another assignee having been appointed in his stead, the rule to enter a suggestion of such death on the record, in pursuance of the statute 6 *Geo.* 4, c. 16, s. 67, is absolute in the first instance. *Westall v. Sturges*, 217

23. Where a verdict is under 20*l.*,

the Court will not grant a new trial, although it be against evidence, and contrary to the opinion of the Judge. *Scott v. Watkinson*, 237

24. The defendant tendered a bill of exceptions at the trial, and which was reduced to writing before the termination of the cause. Three weeks afterwards, at the suggestion of the Judge who presided, a copy of the bill in an extended form was sent to the plaintiff's attorney for his approval, and on the same day the defendant sued out a writ of error, and gave a rule to transcribe:—*Held*, that it was nevertheless the duty of the plaintiff to return the bill of exceptions, although it was insisted that the defendant had waived it by bringing a writ of error. *Taylor v. Wilans*, 257

25. The plaintiff, an attorney in the country, sued his agent in town for negligence in conducting the plaintiff's business, and alleged in his declaration that he had thereby become liable to pay certain sums, and had lost the employment of divers clients. The cause was referred under an order of *Nisi Prius*, by which the plaintiff consented not to bring any action or suit concerning the premises referred. The order was afterwards made a rule of Court, and the arbitrator directed a verdict to be entered for the plaintiff, who afterwards commenced a second action against the defendant, alleging in the declaration that the plaintiff had paid certain sums to persons who had threatened him with actions, and lost the employment of divers other clients, from the negligence of the defendant. The Court refused to stay the proceedings in the second action on motion, but intimated an opinion that the recovery in the former action might be pleaded in bar to the latter. *Dicas v. Jay*, 285

26. The defendant pleaded *non as-*

sumpsit to a declaration in debt, and gave a notice of set off. The plaintiff afterwards took out a summons for particulars of the set off, which being delivered, he signed judgment as for want of a plea:—*Held*, that as the plea was a nullity, the demand of the particulars of set off was not a waiver of the irregularity, and that the plaintiff was, nevertheless, entitled to sign judgment. *Ford v. Bernard*, 302

27. Where the defendant obtained his certificate as a bankrupt, after issue joined, and before trial, but did not plead it *puis darrein continuance*, and the plaintiff proceeded to trial and obtained judgment—the Court refused to order an *exoneretur* to be entered on the bail piece, although the plaintiff's attorney knew, before the trial, that the defendant had got his certificate—because the bail were still in a condition to render the defendant. *Humphreys v. Knight*, 370

28. But *held*, that he was entitled to be discharged on a summary application to the Court under the 6 Geo. 4, c. 16, s. 121. *S. C.* 375

29. The Court will not set aside a verdict and grant a new trial on account of the admission of evidence which ought not to have been received, if there be sufficient without it to authorize the finding of the Jury. *Doe d. Lord Teynham v. Tyler*, 377

30. The Sheriff seized, under an execution sued out by a judgment creditor against *J. S.*, goods which had been previously conveyed by the latter to the plaintiff by bill of sale, of which the Sheriff had notice. The plaintiff and *J. S.* having both refused to indemnify the Sheriff, although he offered to give up the possession of the goods to the plaintiff and return *nulla bona*, and the plaintiff brought trespass against the Sheriff for seizing his goods, the Court ordered the proceedings to be stayed until he was indemnified by the plaintiff, without im-

posing on the Sheriff the payment of costs. *Beavan v. Dawson*, 387

31. A rated parishioner having sued the churchwardens in trespass for turning him out of a vestry room:—*Held*, that he had a right to inspect and take extracts from the parish books, without paying any costs to the person producing them. *Newell v. Simpkin*, 394

32. By a Judge's order, the defendant was required, within a limited time, to deliver to the plaintiff particulars of set off, and, in default thereof, the defendant was to be precluded from giving evidence in support of his set off at the trial. The defendant neglected to comply with the terms of the order, and the cause was afterwards referred, by an order of *Nisi Prius*; and after the arbitrator had proceeded with the reference, a Judge, during the Assizes, made an order for the delivery of the particulars of the defendant's set off:—*Held*, that he had no authority so to do under the statute 1 *Geo.* 4, c. 55, s. 5, as, after the order of reference, the cause was out of Court. *Ashworth v. Heathcote*, 396

33. The plaintiff in his declaration alleged that the defendant had agreed to take him, the plaintiff, into his, the defendant's, service for a year, and, at the expiration of that period, to take him into partnership. Pleas, *first*, the general issue; *secondly*, that there was no agreement or memorandum in writing, as required by the statute of frauds. Replication, that there was an agreement in writing; on which issue was joined:—*Held*, that the defendant was entitled to inspect the agreement, although it was sworn that it consisted only of a letter written by the defendant's agent. *Blogg v. Kent*, 433

34. The Court will not permit a mortgagee to come in and defend as landlord in an action of ejectment,

under the statute 11 *Geo.* 2, c. 19, s. 13, unless he shews that the application is made at his instance and request, and that he is *bonâ fide* interested in the result of the suit. *Doe d. Pearson v. Roe*, 437

35. In an action brought in this Court against an attorney for negligence, he, after a special, instead of of a general special imparlance, pleaded his privilege in abatement, as an attorney of the Court of *King's Bench*. The plaintiff having treated the plea as a nullity and signed judgment; the Court set it aside, on the terms of the defendant's pleading issuably, and to merits; although the plea might not have been sustainable on demurrer. *Godefroy v. Jay*, 440

36. Where special bail have been put in, but have omitted to justify, the Sheriff may put in fresh bail and render the defendant, even after an attachment has issued against him for not obeying a rule to bring in the body. *Hamilton v. Jones*, 454

37. Where, of three defendants, two only are brought into Court, the plaintiff cannot regularly declare. The irregularity is, however, waived by their pleading. *S. C.* 456

38. The defendant, on his arrest, deposited in the hands of the Sheriff the amount of the debt, and 10*l.* for costs, in pursuance of the statute 7 & 8 *Geo.* 4, c. 71, s. 2. The time for putting in special bail expired on the 14th *May*, the time for perfecting, on the 18th:—*Held*, that the defendant had until the latter day to avail himself of the provision of the statute, by making an additional deposit of 10*l.* in lieu of special bail. *Quære*, whether the plaintiff is entitled to move to have the sum deposited in the hands of the Sheriff and paid into Court, paid out to him until he has obtained judgment. *Rore v. Softly*, 464

39. In a joint action of *assumpsit* against three defendants, two of them

pleaded together, and the third by another attorney. The two former only appeared at the trial, and a verdict having been found for the defendants generally, judgment was signed and costs taxed by these two, and paid by the plaintiffs. The Court, on the motion of the third defendant, refused to direct the Prothonotary to review the taxation, and allow his costs. *Smith v. Campbell*, 469

40. Where a witness remains in Court after an order has been made requiring all witnesses to retire, it is in the discretion of the Judge at *Nisi Prius* to admit or reject his testimony, according to circumstances. *Parker v. M'William*, 480

41. Where the trustees under a road-act are sued in the name of their clerk, in pursuance of the statute 3 Geo. 4, c. 126, s. 74, the property of the clerk is not liable to be taken in execution to satisfy the judgment. *Wormwell v. Hailstone*, 512

42. An attorney suing out process in a cause in which he himself is plaintiff, need not indorse thereon his name and place of abode. *Hamilton v. Jones*, 523

43. In ejectment, where the tenant has been admitted to defend, and has entered into the recognizance to pay damages and costs, in pursuance of the statute 1 Geo. 4, c. 87, s. 1, in intitling such recognizance, the name of the tenant should be inserted in place of that of the original nominal defendant. *Roe d. Durant v. Doe*, 531

44. The plaintiff's attorney left two writs of *sci. fa.* at the Sheriff's office, and directed that they should be returned *nihil*, at the same time expressing apprehension lest the proceedings should come to the knowledge of the bail:—The Court, at the instance of the bail, ordered the proceedings to be set aside. *Wilson v. Biden*, 537

45. A prisoner brought up under the compulsory clauses of the Lords' Act, in *Trinity* Term, and remanded, was ordered to be brought up again in the following term, notwithstanding that more than the sixty days allowed by the statute would then have elapsed. *Womersley v. Bousfield*, 539

46. The Court refused to change the *venue* in an action of trover, from *London* to *Lincolnshire*, on the ground that all the defendant's witnesses resided in that county, and that one of them was very aged and could not safely be moved—the plaintiff's witnesses all residing in *London*; but they directed that the evidence of that particular witness should be read from the Judge's notes of a former trial between the parties relative to the same subject-matter. *Alcock v. Cooke*, 573

47. The Court granted a new trial, on payment of costs, where the plaintiff had been nonsuited, in an action against the acceptor of a bill of exchange, by reason of the accidental absence of the witnesses subpoenaed by him to prove the hand-writing of the defendant. *Shillito v. Theed*, 575

48. In the case of bail by affidavit, where time had been allowed to answer affidavits impeaching their sufficiency, the Court refused to allow the defendant in the mean time to justify fresh bail. *Ling's bail*, 576

49. The defendants were sued as directors of an incorporated company, for mis-management of the company's affairs. The Court refused to allow them to inspect the books kept by the company during the period of their directorship, the affidavit of the motion not stating such inspection to be material or necessary to their defence to the action. *Imperial Gas Company v. Clarke*, 727

50. *Holy Thursday* is not a juridical day, and therefore not to be reckoned as one of the four clear days for

a *sci. fa.* against bail to lie in the office. *Scott v. Larkins*, 748

51. The Court discharged with costs a rule for setting aside an execution issued after the allowance of a writ of error, and the justification of bail in error—the writ of error being obtained for the mere purpose of delay, and the bail being men of straw. *Fuller v. Coombe*, 792

52. It is not necessary to produce the original rule on service of a copy, except in cases where the party may be brought into contempt. *Holmes v. Senior*, 828

53. To entitle an attorney to privilege from arrest, he must shew that he is actually practising at the time; a solitary instance of employment at an election will not suffice. *Anonymus*, 810

53. A verdict having passed against one of five defendants in an action of trespass, the cause being, in consequence of the absence from town of his attorney, and the inadvertence of the clerk, taken as undefended—The Court refused to grant a new trial, even on payment of costs, and although it was sworn that there was a good defence on the merits. *Breach v. Casterton*, 867

54. A defendant having been arrested a second time for a sum which had been demanded in a former action, wherein he had before been held to special bail, and the plaintiff had obtained a verdict for a part of his demand, and costs—The Court ordered the defendant to be discharged, on filing common bail, *Hamilton v. Jones*, 868

55. A bill of costs for business done under a commission of bankruptcy, need not be delivered signed by the attorney, a month before action brought thereon. *Ibid.*

PRISONER.

See INSOLVENT DEBTOR, 4, 5, 6, 7.
SHERIFF, 3.

RECOVERIES.

PRIVILEGE.

See ATTORNEY, 4.

PROCEDENDO.

See PRACTICE, 15.

PUBLICATION.

See LIBEL, 7.

PURCHASER.

See TITLE.

QUARE IMPEDIT.

1. In *quare impedit*, a count, alleged an immemorial right in the plaintiffs, as owners of messuages and lands within a chapelry (which lands were charged with the payment of yearly sums for the repair of the chapel), to nominate a curate and present him to the bishop; and it was proved that part of the repairs of the chapel were defrayed out of the poor-rates:—*Held*, to be a variance, and that the evidence did not support the allegation. *Shepherd v. The Bishop of Chester*, 130

2. Where two issues were found for the plaintiffs, and two for the defendants, and the Jury were discharged as to the fifth, and the verdict was entered accordingly, but leave was given to the defendants to move to enter a nonsuit:—*Held*, that the Court might direct the nonsuit to be entered, although the defendants had a verdict on some of the issues. *Ibid.*

3. *Quære*—Whether there can be more than one count in a declaration in *quare impedit*? *Ibid.*

RECOVERIES.

See FINES AND RECOVERIES.

RIGHT OF COMMON.

REGULÆ GENERALES.

MOTIONS FOR NEW TRIALS.

It is ordered by the Court, that, in future, in *Hilary* and *Trinity* Terms, no motion for a new trial shall be heard, unless such motion be actually made within the first four days of each of the said terms. *F. T.* 11 *Geo.* 4. 444

SPECIAL ARGUMENTS.

It is ordered, that, from henceforth, in all special arguments in this Court, notice in writing of the points which are intended to be insisted upon by each of the parties, be delivered to the Judges at their chambers two days before the day on which the case shall be set down for hearing, either by marking the points in the margin of the books delivered to the Judges, or on separate paper; and that each of the parties do, within the same time, leave a copy of such notice at the chambers of the Lord Chief Justice, to be delivered to the adverse party upon his application. *T. T.* 11 *Geo.* 4. 621

RENDER.

See PRACTICE, 4, 27, 36.

RENT-CHARGE.

1. A rent-charge was granted to *B.* during the life of the plaintiff. The grantee died living the *cestui que vie*:—*Held*, that the right to the rent-charge vested in the personal representative of *B.*, the grantee. *Bearpark v. Hutchinson,* 849

REPLEVIN.

See INCLOSURE ACT.

RIGHT OF COMMON.

See TRESPASS.

SHERIFF.

923

SABBATH.

See SUNDAY.

SCIRE FACIAS.

See PRACTICE, 9, 44, 50.

SECURITY FOR COSTS.

1. Where an infant sues by guardian, who is sworn to be in insolvent circumstances, the Court will require him to give security for costs. *Mann v. Berthen,* 215

SET-OFF.

See PRACTICE, 26, 32.

SHERIFF.

See PRACTICE, 4, 30, 44.

1. The Sheriff is responsible for the acts of his officer, though not within the strict line of his duty, provided such acts be afterwards assented to or adopted by the Sheriff. *Underhill v. Wilson,* 568

2. The plaintiff's goods, farming-stock, &c., having been seized under an execution at the suit of one *P.*, the parties, with the assent of the officer, agreed that the latter should remain in possession for a certain period, and that the farm should in the mean time be managed by the plaintiff. The Sheriff in his return took credit for the money laid out upon the farm; and an action was brought in his name by the under-sheriff, wherein a sum of money was recovered upon a contract entered into by the officer with an in-coming tenant, for the sale of hay, &c., the receipt of which sum was admitted in a letter written by the under-sheriff to the plaintiff's attorney:—*Held*, that this was sufficient evidence of an assenting by the Sheriff to the acts of his

officer; and consequently that he was liable to the plaintiff for the surplus proceeds of the goods after satisfying the levy and expenses. *Underhill v. Wilson*, 568

2. The statute 28 Geo. 2, c. 28, s. 1, enacts, that no Sheriff, &c., shall carry any person by him arrested to prison within twenty-four hours from the time of the arrest, unless the party arrested *shall refuse* to be carried to some safe and convenient dwelling-house of his own nomination, within a city, &c., other than the dwelling-house of the party himself, and within the county, &c., or liberty in which the person was arrested:—*Held*, that the omission of the party to name such dwelling-house entitled the officer to carry him direct to prison. *Pitt v. The Sheriff of Middlesex*, 726

SHERIFF'S BOOK.

See PRACTICE, 19.

SHIP BROKER.

See BROKER, 1.

SHIP-OWNER.

See CHARTER-PARTY.

SLANDER.

See PLEADING, 5.

1. In an action on the case for slanderous words alleged to have been spoken by the defendant of the plaintiff, the declaration alleged for special damage, that, "by reason of the committing of such grievance, one *B.* refused to give the plaintiff credit." The evidence was, that the defendant had spoken the words to one *E.*, and that *E.* had communicated the statement, as the statement of the defendant, to *B.*, who thereupon refused to trust the plaintiff:—*Held*, that the allegation was not supported; for that it was the repetition of the slander by *E.* to *B.*,

which was the voluntary act of a free agent, over whom the defendant had no control; and for whose acts he was not answerable, that was the immediate cause of the plaintiff's damage.

Ward v. Weeks, 796

2. In an action of slander for saying of the plaintiff in his trade of a livery stable keeper—"You are a regular prover under bankruptcy:"—*Held*, that, as the words conveyed no imputation upon the plaintiff in the way of his trade, they were not in themselves actionable. *Alexander v. Angle*, 870

STATUTES

CITED OR COMMENTED UPON.

Edward 1.

13, c. 31. Bill of exceptions. 259

Elizabeth.

8, c. 2, s. 2. Costs. 182

James 1.

21, c. 19. Act of bankruptcy. 335

Charles 2.

16 & 17, c. 8, s. 3. Recognizance in ejectment. 761

17, c. 8. Death of party between verdict and judgment. 113

29, c. 3. Statute of limitations. 1

c. 7. Contract on Sunday. 532

William 3.

8 & 9, c. 11, s. 1. Costs. 380

s. 8. Suggestion of breaches. 21

Anne.

8, c. 14, s. 1. Landlord and tenant. 316

George 2.

2, c. 23, s. 23. Attorney's bill. 869

5, c. 30, s. 41. Enrolment of depositions in bankruptcy. 341

11, c. 19, s. 13. Ejectment. 437

28, c. 28, s. 1. Arrest. 726

George 3.

- 32, c. 28, ss. 16, 17. Lords' Act. 269, 538, 539
 33, c. 5. Lords' Act. *Ib.*
 38, c. 78, s. 1. Newspaper proprietors. 99
 39 & 40, c. 99. Pawn-broker. 723
 43, c. 46, s. 3. Costs. 276

George 4.

- 1, c. 55, s. 5. Authority of justices of assize. 396
 1, c. 27, s. 1. Recognizance in ejectment. 391, 531
 s. 3. ————— 761
 1 & 2, c. 78, s. 2. Bills of exchange 275
 3, c. 126, s. 74. Turnpike Act. 512
 6, c. 16, s. 2. Ship-broker may be bankrupt. 551
 s. 3. Act of bankruptcy. 36
 s. 5. Act of bankruptcy. 333
 s. 82. Payment by a bankrupt. 424, 622
 s. 87. Sale by assignees of bankrupt. 635
 s. 95. Enrolment of depositions. 341
 s. 108. Execution. 239
 s. 121. Plea of bankruptcy. 370, 375
 s. 126. Discharge from custody. 370, 375, 525
 c. clxxix, s. 255. Local paving act. 228
 7 & 8, c. 57, s. 16. Insolvent. 201
 s. 32. Insolvent. 87
 c. 71, s. 2. Deposit in lieu of bail. 464
 s. 8. Indorsement of process. 523
 9, c. 14. Statute of limitations. 7, 811
 c. 25. Solicitor of Customs. 79

William 4.

- 1, c. 17, s. 16. Attornies in *Wales*. 789

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STATUTE OF FRAUDS.

1. The plaintiff, an occupier of lands, having been sued by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit; upon which the defendant undertook to indemnify him from all costs of the suit, if he would suffer the defendant to defend in his (the plaintiff's) name. The vicar having succeeded in the suit, the plaintiff's attorney paid him the costs incurred before as well as after the defendant's promise of indemnity:—*Held*, that this was not an undertaking to be answerable for the debt of another, or to be in writing, as required by the statute of frauds. *Adams v. Dansey*, 245

STATUTE OF LIMITATIONS.

1. In *assumpsit* by the drawer against the acceptor of a bill of exchange, the defendant pleaded the statute of limitations; and two letters written by him to the plaintiff's agent were given in evidence, to take the case out of the statute. In the first letter, the defendant said, that he should be much obliged to the plaintiff to withdraw his outlawry; that, as soon as the defendant's situation would allow, the plaintiff's claim, with others, should receive that attention, that, as an honourable man, the defendant considered them to deserve; that it was his intention to pay them, but he must be allowed time to arrange his affairs; and if he were proceeded against, every exertion of his would be rendered abortive. In the second letter, the defendant said that he was willing to do every thing to satisfy the plaintiff, and all his creditors; but that, if he was imprisoned, they would not get any thing:—*Held*, that these

letters did not contain an absolute and unqualified acknowledgment, from which the Court could infer a promise to pay; but merely a conditional offer by the defendant, to give up his income to his creditors, provided he were allowed time to arrange his affairs: and the plaintiff, having offered no evidence of the outlawry, was nonsuited; as, without proof of the outlawry, there was no evidence to connect the acknowledgment in the letters with the plaintiff's claim:—*Held*, that such nonsuit was proper; and the Court refused to grant a new trial. *Fearne v. Lewis*, 1

2. The statute 9 Geo. 4, c. 14, which requires that a promise to take a case out of the statute of limitations shall be in writing, and signed by the party to be charged thereby, does not alter the law as to the nature of the promise, but merely substitutes a different mode of proof. *Haydon v. Williams*, 811

3. The defendant, within six years from the time of contracting the debt, stated in a letter written to his debtor—"that he was incapable at that time to pay the money, but that he would pay as soon as he had it in his power to do so:"—*Held*, that this was a conditional promise only, and therefore not sufficient *per se* to take the case out of the statute of limitations, notwithstanding the 9 Geo. 4, c. 14. *Ibid.*

4. To take a case out of the statute of limitations, the plaintiff offered to prove by oral testimony a written promise, conformable to the 9 Geo. 4, c. 14, the document itself being lost:—*Held*, that such secondary evidence was admissible. *Ibid.*

5. *Quære*, whether a conditional promise relied on to revive a debt barred by the statute of limitations, should not be declared on as such? *Ibid.*

TRESPASS.

STAYING PROCEEDINGS.

See ARBITRATION.

PRACTICE, 5, 7, 9, 17, 18, 20, 25, 27, 29, 30, 35, 41, 44, 51.

STIPULATED DAMAGES.

See AWARD, 3.

SUBPOENA.

See PRACTICE, 6.

SUGGESTION.

See PRACTICE, 22.

SUNDAY.

1. Where a contract for the sale of goods, which have been delivered to and retained by the purchaser, is void by reason of its having been made on a Sunday, a subsequent promise to pay will entitle the vendor to recover the value upon a *quantum meruit*. *Williams v. Paul*, 532

SUPERSEDEAS.

See BANKRUPT, 19.

TENANT FOR LIFE.

See COVENANT.

TITLE.

1. A purchaser is not bound to take a doubtful title. Therefore, where the vendors derived title under an assignment made by a party for the benefit of his creditors, in itself an act of bankruptcy:—*Held*, that they could not compel the purchaser to accept the title, without proof that there was no creditor in a situation to sue out a commission against the assignor. *Pott v. Turner*, 551

TRESPASS.

See INSOLVENT DEBTOR, 4.

1. To a declaration of trespass for breaking and entering the plaintiff's

close called *L.*, the defendant pleaded, that the close was part of *B.* common, and that the defendant had a right to dig and take stone from the common, and from close *L.*, as being part of *B.* common. The plaintiff in his replication, after protesting that close *L.* was not part of *B.* common, alleged that the defendant had no right to dig or take stone from close *L.*; upon which issue was joined. At the trial, the plaintiff admitted that the defendant had a right to dig and take stone from *B.* common, with the exception of close *L.*, and the defendant admitted that he had no evidence to prove the exercise of a right to take stone from that close. A verdict having been entered for the defendant, the Court directed it to be set aside and entered for the plaintiff, as the defendant had not proved the affirmative of the issue, viz. that he had a right to dig and take stone from close *L.* *Maxwell v. Martin*, 291

TROVER.

See PRACTICE, 7.

VENUE.

1. The plaintiff, in journeying from *Tunbridge* to *London*, placed a 100*l.* bank-post bill in her reticule, which hung on her arm. Arrived at *Smithfield*, she left the reticule in a hackney-coach. Upon discovering her loss, she made application at the Hackney-coach office in *Essex Street*, and caused hand-bills to be circulated at all the coach-stands, and at the adjoining public-houses; and also once advertised the loss in a daily paper. On the morning of the day on which the last-mentioned advertisement appeared, the bill in question was cashed by the defendant, a banker at *Brighton*, for a stranger, of whom no questions were asked, except his name and address, which he wrote on the back of the bill in a vulgar manner,

and which afterwards proved to be fictitious. It was left to the Jury to say—*first*, whether the plaintiff had used due and proper caution in her mode of conveying the bill—*secondly*, whether she had exercised a proper degree of diligence in the steps she had taken to make known to the world her loss—*thirdly*, whether the defendant himself had exercised proper caution in receiving a bill of such large amount from a total stranger, without making some inquiry as to where he put up, or whether he was known to any person at *Brighton*. The Jury having found for the plaintiff—The Court refused to disturb the verdict. *Strange v. Wigney*, 470

TURNPIKE-ACT.

1. Where the trustees under a road act are sued in the name of their clerk, in pursuance of the statute 3 *Geo.* 4, c. 126, s. 74, the property of the clerk is not liable to be taken in execution to satisfy the judgment. *Wormwell v. Hailstone*, 512

USURY.

1. An annuity was granted for four lives, with a covenant on the part of the grantor to insure the fourth life, to the amount paid for the consideration, within thirty days after the decease of the three first:—The Court refused to set aside the securities for usury. *In re Nash*, 793

2. The defendant, a pawnbroker, advanced 200*l.* upon a deposit of silks, entering the transaction in his books as several distinct loans of sums each not exceeding 10*l.*, in order to obtain the larger rate of interest allowed by the Pawnbrokers' Act. In trover by the assignee of the owners of the goods, it was left to the Jury to say, whether the goods had been deposited with the defendant upon a contract for the payment of more than 5*l.* per

cent. interest. The Jury having returned a verdict for the plaintiff, on the ground of usury—The Court refused to set it aside. *Tregoning v. Attenborough*, 722

VARIANCE.

1. In an action for a libel, the plaintiff, in the inducement to his declaration, alleged that he had been appointed the surveyor, agent, and steward of a certain company or society of persons called the *New England Company*; and that, in such capacity, he had been and was employed by the said company. It appeared in evidence that the company was incorporated by deed, by the name of "A company for establishing Christianity in *New England*, and the parts adjacent, in *America*." But, as the plaintiff proved that the company was commonly known and designated by the name of "The *New England Company*," the Court held it to be a sufficient description. *Rutherford v. Evans*, 163

2. The defendant addressed a letter to the treasurer of a public company, in which he stated that "the plaintiff was the most artful scoundrel that ever existed, and that he was in every person's debt, and that his ruin could not be long delayed;" but the writer added, "that he had never disclosed the affair, nor ever would, except to the person to whom the letter was addressed, and a friend:"—*Held*, that the omission of the latter part of the letter in the declaration, did not constitute a ground of variance, as the charge imputed by the letter remained the same as that which was contained in the part set out in the declaration. *Ibid.*

3. The plaintiff declared that the defendant, intending to prejudice him in the way of his business as a fruit-broker, falsely represented to *J. P.*,

that the plaintiff had circulated a report in a sale-room where oranges of *J. P.* were selling, that *he, the plaintiff*, then had three or four vessels laden with oranges between *Gravesend* and *London*; by reason of which *J. P.* discontinued to deal with the plaintiff.—Proof, that the defendant represented the plaintiff to have said that *there were* three or four vessels laden with oranges between *Gravesend* and *London*:—*Held*, a fatal variance. *Wood v. Adam*, 208

4. In an action on the case for slanderous words alleged to have been spoken by the defendant of the plaintiff, the declaration alleged for special damage, that, "by reason of the committing of such grievance, one *B.* refused to give the plaintiff credit." The evidence was, that the defendant had spoken the words to one *E.*, and that *E.* had communicated the statement as the statement of the defendant to *B.*, who thereupon refused to trust the plaintiff:—*Held*, that the allegation was not supported; for that it was the repetition of the slander by *E.* to *B.*, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he was not answerable, that was the immediate cause of the plaintiff's damage. *Ward v. Weeks*, 796

VENUE.

1. The Court refused to change the venue, in an action of trover, from *London* to *Lincolnshire*, on the ground that all the defendant's witnesses resided in that county, and that one of them was very aged and could not safely be moved—the plaintiff's witnesses all residing in *London*; but they directed that the evidence of that particular witness should be read from the Judge's notes of a former trial between the parties relative to the same subject matter. *Alcock v. Cooke*, 573

WITNESS.

WAIVER.

See PRACTICE, 26, 37.

WALES.

See FINES AND RECOVERIES, 4.

WARRANT OF ATTORNEY.

See ANNUITY, 1.

WATER-COURSE, OBSTRUCTION OF.

See ACTION ON THE CASE, 2.

WILL.

See DEVISE.

WITNESS.

See PRACTICE, 47.

1. To render a person liable to an attachment for not attending upon a *subpoena*, it is incumbent on the par-

WRIT OF ERROR. 929

ty applying to state that he was a material and necessary witness for him. *Taylor v. Willans,* 59

WRIT OF ENTRY.

1. The husband of one of two co-heiresses became bankrupt after an abatement:—*Held*, that his right to bring a writ of entry passed to his assignees by the bargain and sale under the commission. *Mitchell v. Hughes,* 577

WRIT OF ERROR.

See EJECTMENT, 6.

1. The Court discharged with costs a rule for setting aside an execution issued after the allowance of a writ of error, and the justification of bail in error—the writ of error being obtained for the mere purpose of delay, and the bail being men of straw. *Fuller v. Coombe,* 792

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